

No. 16483

See Also

3113

United States
Court of Appeals
for the Ninth Circuit

ROBERT L. HARGRAVE,

Appellant,

vs.

E. G. WELLMAN, doing business as Wellman
Enterprises,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Montana

FILED

AUG - 4 1959

PAUL J. O'BRIEN, CLERK

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Court of Appeals
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ROBERT L. HARGRAVE, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Great Falls, Montana,

KOURI AND BANNER,
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Wichita Falls, Texas,

Attorneys for the Plaintiff-Appellant.

JARDINE, STEPHENSON, BLEWETT &
WEAVER, AND GEORGE McCABE,
410 First National Bank Building,
Great Falls, Montana,

Attorneys for the Defendant-Appellee.

In the United States District Court, District
of Montana, Great Falls Division

Civil Action No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, D/B/A WELLMAN ENTER-
PRISES, and VIRGIL DILLON,
Defendants.

COMPLAINT

To the Honorable Judge of Said Court:

Now comes Dr. Robert L. Hargrave, M.D., hereinafter styled Plaintiff, complaining of E. G. Wellman, d/b/a Wellman Enterprises, and Virgil Dillon, hereinafter styled Defendants, and for cause of action would respectfully show the Court as follows:

I.

That the Plaintiff is a citizen and resident of Wichita County, Texas.

II.

That the Defendants are citizens and residents of East Glacier Park, Montana, where they may be served with service of process.

III.

That there is a diversity of citizenship between the parties hereto and the amount in controversy

exceeds the amount of \$3,000.00. Wherefore, this Honorable Court has jurisdiction of this cause.

IV.

That on or about June 23, 1956, and prior thereto, the Defendant, E. G. Wellman, d/b/a Wellman Enterprises, was and is still engaged in the business of operating a riding horse concession at the Many Glacier Hotel in Glacier National Park, Montana; with the Defendant, Virgil Dillon, a seasoned horse expert, in charge of said stables.

V.

That on or about the 23rd day of June, 1956, the Plaintiff, Dr. Robert L. Hargrave, in the company of his young daughter, Ann, had rented some horses from the riding stables which were owned and operated by the Defendant, E. G. Wellman, and rode said horses to a lake. That on the return trip and on the way to the stables, the horse on which your Plaintiff was riding suddenly bolted and began running, which threw your Plaintiff violently forward and flexed his back, resulting in serious and permanent injuries as will be hereinafter more fully detailed.

VI.

Plaintiff alleges that the Defendants, their agents, servants and employees were careless, reckless and negligent in the following particulars, to wit:

(a) That the Defendants, their agents, servants and employees, were negligent in failing to disclose

the wild nature and manner of the said horse, especially wherein Plaintiff had revealed to the Defendant's agent, Virgil Dillon, that it had been quite a long time since he had ridden a horse.

(b) That the Defendants, their agents, servants and employees, were negligent in representing the horse in question was gentle, when they knew, or should have known with the exercise of ordinary care, that said horse had a habit of suddenly running, and that they knew that said horse was not satisfactory for use in a riding stable.

(c) That the Defendants, their agents, servants and employees, were negligent in that they were experts in training and handling of horses and that they allowed the Plaintiff to mount and ride said horse and that the Defendants, while acting in the capacities aforementioned, knew from their superior knowledge concerning horses that this particular horse might, or probably would suddenly break out and run at full speed, when they knew full well that the Plaintiff was not an experienced rider.

(d) That the Defendants, their agents, servants and employees, were negligent in that they possessed the superior knowledge of all the horses in said stables, knowing their peculiar characteristics to run at full speed without any urging, and that at the time the Plaintiff was severely injured, the Defendant, Virgil Dillon, without any warning to the Plaintiff, broke out in full speed with his mount, which was unknown to the Plaintiff but which caused Plaintiff's mount to suddenly bolt forth and

break out into a speed, and that this said negligence was the cause of Plaintiff's injuries.

That each and every specific act of negligence hereinabove detailed and/or a combination of same, were a direct, positive and proximate cause of Plaintiff's serious and severe injuries and resulting damages.

VII.

Plaintiff would show that as a direct result of his being thrown violently forward by the sudden motion of said horse, he sustained a compression fracture of the 10th dorsal vertebra, also damaging the 10th and 11th dorsal spinous processes, all resulting in marked muscle spasm, resulting in damage to the lumbo-sacral area which has caused damage to the vertebrae in the entire spinal column and impairment of the discs in the entire spinal column, more particularly in the dorsal region, and that said injuries have resulted in hypertrophic spurring of the margins of the lumbar vertebrae, particularly around lumbar vertebra 4, all of which has affected his entire nervous system and resulted in permanent disability.

That as a result of said injuries, Plaintiff has been permanently disabled and has suffered great pain and mental anguish and which has also resulted in the disruption of Plaintiff's entire nervous system and that said condition will continue the rest of Plaintiff's natural life. That by reason of all the above and foregoing, your Plaintiff, Dr. Robert L. Hargrave, has been injured and damaged in the sum of \$100,000.00.

VIII.

Plaintiff would further show that due to said injuries, which he sustained due to the negligence of the Defendants, he has been forced to limit his practice of medicine and surgery, due to his injuries and pain and suffering, and as a result thereof, his practice has decreased and that he has sustained a loss of earnings in the past and will sustain a loss of earnings and medical and surgical fees in the future, to his further damage in the sum of \$100,000.00.

IX.

Plaintiff would further show that as a result of the injuries he received on the above date, he has been forced to seek medical aid and care and has had to have numerous x-rays made. That such x-rays and medical care and attention has amounted to the sum of \$1,000.00, which sum is just, fair and reasonable. That he will require further treatment and care in the future, which will amount to the approximate sum of \$5,000.00, which sum will be just, reasonable and necessary and for which past and future medical expenses Plaintiff asks his damages.

X.

Plaintiff would further show that the said Defendant, Virgil (Blackie) Dillon, was an agent, servant and employee of the Defendant, Wellman, and that immediately before and at the time of Plaintiff's injuries, the Defendant, Virgil (Blackie) Dillon was acting within the scope of his employ-

ment for his said master, E. G. Wellman, to wit, in that he was carrying on his duties for said Defendant Wellman in caring for and looking after said horses in said stables, in renting out said horses and accompanying the Plaintiff on said trip.

Wherefore, premises considered, Plaintiff prays that the Defendant be cited to appear and answer herein, and that upon final hearing hereof, he have his judgment against the Defendant in the sum of \$206,000.00; for all costs of suit in his behalf expended, and for such other and further relief as he may show himself entitled to receive.

KOURI AND BANNER,

/s/ L. R. BRETZ,

Attorneys for Plaintiff.

/s/ PHILIP S. KOURI,

One of Counsel.

Endorsement

Plaintiff respectfully requests a jury trial in this cause.

/s/ PHILIP S. KOURI.

[Endorsed]: Filed March 20, 1957.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant, E. G. Wellman, and for his separate answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

This defendant admits the allegations contained in paragraphs I, II, III, IV, X, and in paragraph V admits that plaintiff at the time and place alleged, rented some horses for the purpose of riding to a lake; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs VII, VIII and IX; denies each and every other allegation contained in said complaint, specifically denying any negligence or carelessness on his part or on the part of his agents, servants or employees, and further specifically denying that the horse involved was wild in nature and manner or in any other way unsuitable for the purpose rented.

Third Defense

If this defendant was negligent in any of the matters set forth in said complaint, then and in that event any injury received by plaintiff was due to and caused by the contributory negligence of the plaintiff and his failure during the times mentioned in said complaint to exercise such care and caution for his own safety as a reasonably careful and prudent person under the circumstances then and there existing could, would and should have exercised. That the personal injuries sustained by plaintiff, if

any, were proximately due to and caused by his own contributory negligence.

Fourth Defense

At all times referred to in said complaint plaintiff was a male adult of average intelligence or better and in possession of normal faculties of observation and then and there fully able to observe, understand and ascertain the facts and circumstances existing, having represented himself to the defendant as an experienced horseman; plaintiff elected to place himself on said horse and thereby voluntarily assumed entirely any risk of injury to himself resulting, or which might result, out of or in connection with the ordinary risks incident to horseback riding.

Wherefore, having fully answered, defendant, E. G. Wellman, prays that plaintiff take nothing by his complaint herein, and that this defendant have his costs and disbursements herein expended.

ART JARDINE,
JOHN D. STEPHENSON,
ALEX BLEWETT, JR.,
JOHN H. WEAVER,

/s/ By ALEX BLEWETT, JR.,

Attorneys for Defendant E. G.
Wellman.

Acknowledgment of Service Attached.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

PLAINTIFF'S REQUEST FOR
INSTRUCTIONS

Comes now the plaintiff, Dr. Robert L. Hargrave,
and respectfully requests that the Court give the
plaintiff's requested instructions numbered 1 to 9,
inclusive.

KOURI & BANNER,
L. R. BRETZ,
/s/ By L. R. BRETZ,
Attorneys for Plaintiff.

Instruction No. 1

You are instructed that under the doctrine of *res ipsa loquitur* it means that when an instrumentality which causes injury, without any fault of the injured person, is under exclusive control of the defendant at the time of the injury, and that the injury is such as in the ordinary course of things does not occur if one having such control uses proper care, law infers negligence on the part of the one in control as the cause of the injury.

The doctrine is especially applicable when there exists the relationship of passenger and carrier.

Whitney v. N. W. Greyhound, 125 Mont. 528.

Instruction No. 2

You are instructed that a bailor of animals has a duty to warn the bailee or rider of the habits, traits or propensities of the animal where there is good

reason to believe that the rider or bailee will be injured unless warning is given to him. And the bailor or owner of the animal, or his agent, servant and/or employee has the duty to warn the rider or bailee, or call it to his attention before the commencement of a sudden gallop of the animals, if the owner or his agent, servant and/or employee were riding in company with the rider and bailee as a guide or one in charge of a riding trip.

14 Am. Jur. Sec. 14:1129, P. 646.

Instruction No. 3

You are instructed that to make an act wanton, the party doing the act or failing to act must be conscious of his conduct, and though having no intent to injure, must be conscious, from his knowledge of the surrounding circumstances and existing conditions that his conduct will naturally and probably result in injury to another.

38 Am. Jur. Sec. 48, 364 (Negligence).

Instruction No. 4

You are instructed that a person is guilty of contributory negligence only in so far as he, or some person for whose conduct he is responsible, is at fault. A person's right to recover is not affected by his having contributed to his injury unless he was in fault in so doing. Fault can be predicated upon the person's conduct only where such conduct was in violation of a duty on his part to exercise care. There is no contributory negligence without the violation of some duty, and there

can be no contributory negligence when no duty is placed on the plaintiff to exercise care.

Knight v. LaGrande, 271 P. 41, 61 ALR 256,—
38 Am. Jur. P. 858-9.

Instruction No. 5

You are instructed that the doctrine of assumption of risk does not apply unless the particular condition of peril if any, has continued long enough so that the person alleged to have assumed the risk can be found to have known or to have been charged with knowledge of the danger, if any. The doctrine of assumed risk is based upon voluntary exposure to danger and is applicable only in cases where the injured person might reasonably elect whether or not he should expose himself to peril. If the exposure of the injured party to the peril, if any, was due to his inability reasonably to escape after he became, or should have become aware of the danger, the doctrine does not apply.

Alexander v. GN RR 51 Mont. 565, 154 P. 914.

Instruction No. 6

You are instructed that in a contract of hiring with one who rents horses for riding purposes in the absence of any notice to the contrary, there is contained an implied warranty to the rider, that the renter or owner of the animal knew or had exercised reasonable care to ascertain the habits, traits and propensities of the horse and that the animal was safe and suitable for the purpose for which the

owner or keeper hired the horse to the renter or rider thereof.

To inform himself of the habits, traits, disposition and propensities of horses which he keeps in his stable for hire, is the duty of the keeper or owner, and if he knows or in exercise of reasonable care should ascertain that his animals are unsafe and unsuitable under certain condition, he is liable for injuries to his customers resulting from the habits, traits and propensities of the animals so hired to his customers. The relationship of bailor and bailee, on the contract of hire, comes into being between the parties, and the bailor impliedly warrants the horse as being fit for the purposes for which it was hired.

Mateas v. Fred Harvey 146 F 2d, 989.

Instruction No. 7

You are instructed that when personal property is delivered to another under a contract of hiring, the relation is bailment for the mutual benefit of both parties.

You are further charged that a bailor or owner of animals which to his knowledge possess habits, traits or propensities likely to result in injuries to their riders, is under duty to inform the bailee or rider thereof; and in the case of a bailor for hire, liability may be predicated upon bailor's or owner's failure to use due care in furnishing an animal suitable for the purpose for which it was hired.

3 CJS Sec. 13, P. 1098,—*Koser v. Hornback*, 75

Idaho 24, 265 P 2d 988,—*Palmquist v. Mercer*, 272 P. 2d 26.

Instruction No. 8

A common carrier may be defined as one who holds himself out to the public as engaged in the business of transporting persons or property from place to place for compensation, offering his services to the public generally. Everyone who offers to the public to carry persons, is a common carrier of whatever he thus offers to carry.

You are therefore charged that a common carrier must use the utmost care and diligence for the safe carriage of persons, and must provide everything necessary for that purpose and must exercise to that end a reasonable degree of care.

9 Am. Jur. P. 430,—Section 8-701 RCM (1947).,—and *Brown v. Columbia Amusement* 91 M174, 6 P 2d 874.

Instruction No. 9

You are instructed that an invitee is one who enters upon the premises of another in the interest of, or for the benefit of, the occupant or owner of such premises, or in a matter of mutual interest, or in the usual course of the business of such occupant or owner, or on his invitation, express or implied. With respect to an invitee, the owner of a riding academy owes the duty of exercising ordinary and reasonable care in furnishing of horses that do not have habits, traits or propensities likely to result in injuries to their riders.

And you are further charged that the knowledge of a servant of the owner, of the traits or propensities of the animal in whose charge it has been placed, amounts to the knowledge of the master or owner.

Herbert vs. Ziegler, 139 A. 2d, P. 699.

Instruction No. 10

If you find from a preponderance of the evidence that defendant E. G. Wellman instructed his agents and especially said Virgil Dillon as to their duties respecting the selection and hiring of horses for paying patrons, and if you find from a preponderance of the evidence that the said Virgil Dillon was instructed by the defendant to advise paying patrons as to the habits of the trail horses, and if you find from a preponderance of the evidence that Virgil Dillon failed to advise plaintiff Dr. Robert L. Hargrave as to the habits of his horse on June 23rd, 1956, then you may consider this failure to advise and instruct, an act of omission and as negligence within the meaning of the courts instruction on such subject.

Instruction No. 11

If you find from a preponderance of the evidence that Virgil Dillon on June 23rd, 1956 at the time of renting a horse to plaintiff failed to instruct him as to the habit of the horse to follow the lead horse at all times, and failed to warn or caution plaintiff respecting the fact that his mount would gallop if the lead horse should do so, then such an

omission to instruct and caution may be considered a failure to exercise ordinary care for the safety of plaintiff and is negligence as defined by the courts instruction on such.

Instruction No. 12

If you find from a preponderance of the evidence that Virgil Dillon did on the 23rd day of June, 1956 suddenly and without warning to plaintiff cause his horse to gallop or run along the trail and that the plaintiff's horse was caused by such action to follow suit, then such an act may be considered a failure to exercise ordinary care for the safety of plaintiff and is negligence as defined by the courts instruction on such.

Plaintiff's Proposed Statement of the Case Respecting Negligence

Plaintiff maintains that the defendant Wellman was negligent through the actions of his employee, Virgil Dillon on June 23, 1956 in several ways, the first being that he failed to advise, instruct or warn plaintiff in any way that plaintiff's mount might commence a gallop or run in the event that his (Dillon's) horse should do so because of the fact that plaintiff's mount was a trail horse and trained to follow the action of the lead horse; plaintiff urges that the second allegation of negligence is based on Virgil Dillon's sudden action in urging his horse ahead at a gallop on the return trip from Lake Josephine, he knowing at the time that such accelerated movement would cause the horse of

plaintiff to follow suit, since the training of the horse was of such a nature as to expect that he would do the same thing that the lead horse would do.

If you find from the evidence that it was the custom of defendant through his agents and employees to instruct patrons as to the habits of the trail horses rented and if you find from a preponderance of the evidence that Virgil Dillon failed on June 23, 1956, to follow this custom and to instruct plaintiff respecting the habit of his horse to follow the lead trail horse at all times, then you may consider this omission to follow the custom as negligence defined by the court's instruction on the subject.

[Title of District Court and Cause.]

VERDICT

We, the jury in this action, find for the defendant upon the claims stated in the complaint.

Dated this 23rd day of January, 1959.

/s/ WILLIAM E. DAY,
Foreman.

[Endorsed]: Filed and Entered January 23, 1959.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil Cause No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, doing business as WELLMAN
ENTERPRISES, Defendant.

JUDGMENT OF GENERAL VERDICT
FOR DEFENDANT

This action came on regularly for trial on the 20th day of January, 1959, with Philip Kouri and L. R. Bretz appearing as counsel for Plaintiff and Alex Blewett, Jr., and George McCabe, as counsel for Defendant. A jury of twelve persons was regularly impaneled and sworn to try said action, and witnesses on the part of the plaintiff and defendant were duly sworn and examined. After hearing the evidence, the arguments of counsel and the instructions of the Court, the Jury retired to consider their verdict and subsequently returned into the Court with the verdict signed by the foreman, and being called, answered to their names and say: "We, the jury in this action, find for the defendant upon the claims stated in the complaint."

Dated this 23rd day of January, 1959.

/s/ WILLIAM E. DAY,
Foreman.

Wherefore, It Is Ordered, Adjudged and Decreed that the defendant have and recover from Plaintiff, Defendant's costs and disbursements incurred herein in this action, amounting to the sum of Five Hundred Eleven and 80/100 Dollars (\$511.80).

Judgment Entered this 26th day of January, 1959.

/s/ DEAN O. WOOD,
Clerk.

[Endorsed]: Filed and Entered January 26, 1959.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Dr. Robert L. Hargrave, the Plaintiff in the above entitled and numbered cause, hereby appeals said cause of action to the United States Court of Appeals for the Ninth Circuit, sitting at the Federal Building in San Francisco, California, from a judgment entered in this cause of action on the 23rd day of January, 1959.

Filed this 19th day of February, A.D. 1959.

L. R. BRETZ,
KOURI AND BANNER,
Attorneys for Plaintiff.

/s/ PHIL KOURI,
One of Counsel.

Affidavit and Acknowledgment of Service Attached.

[Endorsed]: Filed February 19, 1959.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents: That we, Dr. Robert L. Hargrave, as Principal, and the other signers hereto as Sureties, acknowledge ourselves to be jointly indebted to E. G. Wellman d/b/a Wellman Enterprises, Appellees in the above cause, in the sum of Seven Hundred Sixty-One and 80/100 (\$761.80) Dollars conditioned that, whereas, on the 23rd day of February, 1959, in the District Court of the United States for the District of Montana, Great Falls Division, in a suit pending in that Court wherein Dr. Robert L. Hargrave was Plaintiff and E. G. Wellman, d/b/a Wellman Enterprises was Defendant, numbered on the civil docket as Civil Action No. 1917, a judgment was rendered against the said Dr. Robert L. Hargrave, as Plaintiff, having filed in the office of the Clerk of said United States District Court a notice of appeal to the United States Court of Civil Appeals for the Ninth Circuit to be holden in the City of San Francisco, and State of California.

The commission of the above obligation is such that if the said Dr. Robert L. Hargrave, Plaintiff, shall prosecute his appeal to effect and answer all costs after the appeal is dismissed, or after the judgment is affirmed, shall be modified, then the above obligation is void; else shall remain in full force and effect.

Witness our hands this the 20th day of February,
A. D. 1959.

/s/ ROBERT L. HARGRAVE,
Principal.

[Seal] TRINITY UNIVERSAL
INSURANCE COMPANY,

/s/ By N. L. THOMPSON,
Attorney in Fact,
Surety.

[Endorsed]: Filed February 27, 1959.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States
District Court for the District of Montana, do
hereby certify that the annexed papers, to-wit:

Complaint

Answer

Plaintiff's Request for Instructions

Verdict

Judgment on General Verdict for Defendant

Notice of Appeal

Points Relied Upon for Appeal

Cost Bond on Appeal

Motion to Extend Time for Filing Record and
Docketing Appeal

Order Extending Time to File Record and
Docket Appeal

The Praecept and Designation of the Record

Designation of Additional Portions of the Record;
and the Reporter's Transcript in a separate volume, accompanying this certificate, are the originals filed in Case No. 1917, Dr. Robert L. Hargrave, Plaintiff, vs. E. G. Wellman, d/b/a Wellman Enterprises, Defendant, and designated by the parties as the Record on Appeal in said cause, and I further certify that I transmit herewith as a part of the Record on Appeal, as designated by the parties, the original exhibits introduced at the trial of said cause, the said exhibits being as follows, to-wit:

Plaintiff's #1, Drawing of Bit.

Plaintiff's #2, Drawing of Bit.

Plaintiff's #3, Drawing of Bit.

Plaintiff's #4, Drawing of Bit.

Plaintiff's #5, Photo.

Plaintiff's #6, Photo.

Plaintiff's #7, Photo.

Plaintiff's #8, Photo.

Plaintiff's #9, Photo.

Plaintiff's #10, Photo.

Plaintiff's #11, Photo.

Plaintiff's #12, Photo.

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Plaintiff's #14, X-Ray.

Plaintiff's #15, X-Ray.

Plaintiff's #16, X-Ray.

Plaintiff's #17, X-Ray.

Plaintiff's #18, Grocery Bill—Page 13 of the Deposition of Ryan.

Plaintiff's #19, Grocery Bill—Page 13 of Deposition of Ryan.

Plaintiff's #20, American Table of Mortality.

Plaintiff's #21, X-Ray.

Plaintiff's #22, X-Ray.

Plaintiff's #23, X-Ray.

Plaintiff's #24, X-Ray.

Plaintiff's #25, X-Ray.

Plaintiff's #26, Medical Report.

Plaintiff's #27, Medical Report.

Plaintiff's #28, Medical Report.

Plaintiff's #29, Medical Report.

Defendant's #30, X-Ray.

Defendant's #31, X-Ray.

Plaintiff's #32, Doctor's Report.

Defendant's #33, Map.

Defendant's #34, Photo.

Witness my hand and the Seal of said Court at Great Falls, Montana, this 18th day of May, 1959.

[Seal]

DEAN O. WOOD,

Clerk,

/s/ By C. G. KEGEL,

Deputy Clerk.

In the District Court of the United States, District
of Montana, Great Falls Division

Civil No. 1917

DR. ROBERT L. HARGRAVE, Plaintiff,

vs.

E. G. WELLMAN, d/b/a WELLMAN ENTER-
PRISES, and VIRGIL DILLON,
Defendants.

TRANSCRIPT OF TESTIMONY

Before Honorable William J. Jameson, United
States District Judge (with a jury).

January 20, 21, 22 and 23, 1959. At Great Falls,
Montana.

Appearances: For the Plaintiff: McCabe, Mc-
Cabe and Bretz, Attorneys at Law, Great Falls,
Montana (by Mr. Bretz); Kouri and Banner, 927
Oil and Gas Building, Wichita Falls, Texas (by Mr.
Kouri). For the Defendant: Jardine, Stephenson,
Blewett & Weaver, Attorneys at Law, First Na-
tional Bank Building, Great Falls, Montana (by
Mr. Blewett and Mr. McCabe). [1]*

* Page numbers appearing at bottom of page of Reporter's
Transcript of Record.

E. G. WELLMAN

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bretz): Will you state your full name for the record please, Mr. Wellman.

A. E. G. Wellman.

Q. And will you tell the jury where you reside at this time? A. Essex, Montana.

Q. And how long a time have you resided there?

A. Approximately two years.

Q. Would you tell us where you resided prior to that time? [8]

A. Bear Creek Ranch, which is eleven miles east of there.

Q. What is your occupation or profession? Would you tell us that?

A. Guest ranching and saddle horse concession, Glacier National Park.

Q. And how long a time have you had this saddle horse concession?

A. Approximately eight years.

Q. And where do you principally operate the concession in the park?

A. Well, in the entire park.

Q. Does that include the area about Many Glaciers? A. Yes, it does.

Q. And what do you use these horses for up there?

A. We use them for saddle horses, pack horses.

(Testimony of E. G. Wellman.)

Q. And you rent these horses to the general public? A. That is right.

Q. And can you tell the jury what the general charge is that is made for rental?

A. The general charge for half day trips at the present time is \$5.00 or all day trips are \$7.50 and we have a two hour ride at \$3.50.

Q. And you say that you have pack horses and also riding horses? [9] A. Correct.

Q. Is it possible, or do you use the pack horses for riding? A. No.

Q. They are a separate category, are they?

A. Yes.

Q. How do you select your riding horses?

A. By training them for such. We have pack horses, which naturally are heavier type horses, and sometimes we have a dual purpose horse, but usually they are designated as different. Some of the pack horses have never been ridden.

Q. You say these horses are trained specifically for riding purposes? A. That is right.

Q. I wonder if you could tell us what this training consists of?

A. It is not like common ranch work is. They are not trained to break out, or roping or anything. They are kept as gentle as possible. When they are haltered at four to six months of age, they are worked with constantly so that they become inclined to work as they should, for guests of that type.

(Testimony of E. G. Wellman.)

Q. Well, the training then consists of halter breaking them, is that it?

A. That is one step, yes.

Q. What would be the next step after that? [10]

A. Well, sir, at six months of age you wouldn't do much more with them at that time. Then they are released and the next following spring perhaps we take them back and bring them through the same steps of halter breaking. After that is done they are put into a corral and maybe a saddle is put on them. Nobody mounts with them at that time. Maybe two weeks after gentling them down, so that they understand what you want, perhaps we put one of the reins, put a bridle on them and tie one of the reins onto the saddle and keep them in a circle. After that we turn them the other way, and perhaps another week later we mount them and ride them around the corral so that they understand the commands and what we want of them.

Q. Now do you have employees, I take it?

A. Pardon?

Q. You have a number of employees, I take it, that assist you in this business?

A. Yes, I do.

Q. How many employees do you have in your Many Glaciers there?

A. It can vary from seven to fifteen.

Q. And have you ever had occasion to employ one Virgil Dillon to work for you?

A. I have.

(Testimony of E. G. Wellman.)

Q. And how long a time has he worked for you?

A. Oh, the past eight years. [11]

Q. Now he would have first went to work for you about 1950, I take it? A. Yes.

Q. And were you acquainted with his experience at the time of your hiring Mr. Dillon?

A. Yes, he was highly recommended. He has worked in the Park for a good many years.

Q. What did his duties consist of at Many Glaciers in the year 1956? A. As a guide.

Q. As a guide? And what are the duties of a guide?

A. Generally maintaining and helping maintain the horses, and leading the people on trips.

Q. You say that he leads the people?

A. That is right. A guide is sent with each party, each person.

Q. And are the horses ever allowed to go by themselves? A. No, sir.

Q. I take it then it is the guide's responsibility to see that the horses follow him, is that generally what it is? A. Correct.

Q. Now I wonder if you could tell us who it is that prepares these horses for the general public to ride, who saddles them and bridles them? [12]

A. Each guide helps so that he knows his horse is in shape to go. They are assigned approximately ten each.

Q. Mr. Dillon had ten horses assigned to him in 1956?

(Testimony of E. G. Wellman.)

A. I am sure he must have, if he was at the hitch rack, yes.

Q. And he would personally saddle the horses?

A. He would have helped.

Q. When you say he would have helped, I take it there are others who would have helped?

A. We have a barn boss, a corral man, you bet you.

Q. They work together? A. Right.

Q. And does that include the installation of the bridle and bit? A. Right.

Q. So that Mr. Dillon would perhaps bridle half of them and your barn man would handle the others? A. Very true.

Q. I wonder if you could tell the jury what types of bits you use up there, very generally?

A. Most of them are a mild port bit, by Crocket.

Q. What is that bit made out of?

A. Aluminum.

Q. Aluminum. And when you say mild port, what do you mean by that? [13]

Mr. Blewett: Your Honor, may I just rise at this time so that the record is straight in connection with the discussion we had prior to trial. If the evidence being adduced through this witness is in connection with that, I would like an objection entered to this as not being within the scope or line of the pleadings.

The Court: Yes, you may have a continuing objection to all this line of testimony. The Court will overrule the objection subject to motion to

(Testimony of E. G. Wellman.)

strike if not properly connected up, and also subject to appropriate instructions to the jury.

Mr. Blewett: Do I understand then any reference to the type of bridle or bit or saddle is subject to a continuing objection?

The Court: That is right, it won't be necessary for you to make objection. All of this evidence with reference to the type of bit and saddle and equipment is subject to the objection.

Mr. Blewett: I understand that is not only of this witness, but any witnesses.

The Court: All witnesses. That will save objections.

(The question was read by the reporter.)

Q. Would you tell us what you mean by a mild port?

A. Mild port—are you familiar with bits?

Q. Yes, I am.

A. The port in a bit—now we have a mild port which [14] perhaps could raise an inch. Your bit is flat in the center. There is a mild port, you can buy them that raise 3 inches, but you don't use them in the park because the humane society enters into it, and they are too severe. That is what I mean by mild port.

Q. I wonder if it would be possible to have you show us on a piece of paper what you mean by port?

A. I would be very happy to.

Q. (Drawing) I have drawn the shanks in. I wonder if you will put the port on there for us?

A. Yes, I will do it (draws).

(Testimony of E. G. Wellman.)

Q. And this would be——

A. A mild port.

Q. A mild port. And these would be aluminum bits?

A. These particular bits are aluminum, yes.

Q. And I believe you have identified them as being a Crocket bit? A. Yes.

Mr. Bretz: I wonder if we could mark this as a plaintiff's exhibit, proposed exhibit #1.

(Plaintiff's proposed exhibit #1, being an illustration of a bit, was marked by the clerk for identification.)

Mr. Blewett: If the record may show that the defendant has no objection to the proposed plaintiff's exhibit #1 provided it is for illustrative purposes only. It is not [15] drawn to scale and it is not a true and accurate representation. I may ask the witness some questions, but I am willing it go in then with that understanding, it is illustrative.

Mr. Bretz: Yes.

The Court: Plaintiff's Exhibit #1 is received for illustrative purposes.

(At this time Plaintiff's Exhibit #1, being an illustration of a bit, was made a part of the record and received into evidence by the Court.)

Q. I wonder, Mr. Wellman, if you would mark on the drawing——

A. Let's complete the bit first. You have a bit strap that goes on and a few other things.

Q. I understand that. Would you like to put the chin strap in?

(Testimony of E. G. Wellman.)

A. I certainly would, if you are going to have this for an exhibit. (Draws.)

Q. This would be—— A. The curb strap.

Q. And may I ask you what this strap is made of? A. It is made of leather.

Q. It is a leather strap. So that the jury will understand the parts of a bit, for those who are not acquainted, I will mark on there an arrow pointing to that, and this piece you have drawn on here is aluminum?

A. Yes, that is right. The entire bit is made of aluminum. [16]

Q. You mentioned a moment ago that this port is curved in inches.

A. I wouldn't say it was curved in inches. It has an inch raise in it.

Q. It has a raise of about an inch?

A. Yes, it could vary.

Q. That you mean would be from the level——

A. To the top of the curve.

Q. So if we marked in here (marking).

A. Approximately one inch, yes.

Q. One inch, that would be approximately right, would it not? A. Yes.

Mr. Bretz: I might just exhibit that so that the jury can see what we are talking about.

Mr. Blewett: Your Honor, I don't want to be understood that I am waiving the previous objection by allowing this in.

The Court: That is understood, you have the continuing objection.

(Testimony of E. G. Wellman.)

Q. The type of bit we have referred to, Mr. Wellman, is this what you call a grazing bit?

A. Right.

Q. And I believe the sides of the bit would be called the shank, would they not? [17]

A. Right.

Q. And would you have some estimate as to the length of the shanks on these particular bits we talk of now?

A. About six and a half inches. They are curved back a little bit. That is why they are a grazing bit.

Q. Are six inch shanks the most common in your experience?

A. We use them up there, yes. They have been very prominent the last five years.

Q. I wonder if you can tell the jury the purpose of the shank on a bit?

A. That helps you to control your horse.

Q. Does that provide any leverage?

A. Yes, it does on the curb strap.

Q. And when you apply some pressure to the rein, the curb strap draws tighter, does it not, on the jaws of a horse?

A. It does.

Q. Do you use any other type of bits?

A. We use a snaffle bit. It is a mild bit. Everything we use up there is very mild.

Q. For those of the jury who don't know what a snaffle bit is, I wonder if you could draw generally all of that?

A. The fact is we start all our colts with snaffle bits and they have a large rein on the side, and

(Testimony of E. G. Wellman.)

they are not so apt to pull them into their mouth.

Q. I wonder if you would show us generally what they are? [18]

A. I will try (draws). They have a break in the center.

Q. And reins are attached to each side?

A. Yes, and you can also use a chin strap on them.

Mr. Bretz: I wonder if you would mark this as Plaintiff's Exhibit #2, for illustrative purposes only?

(At this time Plaintiff's Exhibit #2, being an illustration of a bit, was marked by the clerk for identification.)

Q. Would the length of the bit be the same as the other one approximately?

A. Approximately, yes.

Q. Wide enough to go into the horse's mouth?

A. Yes.

Mr. Bretz: (To jury) You can get an idea of what we are talking about. Pass that around.

The Court: I don't believe that has been received in evidence.

Mr. Bretz: Excuse me. I would offer that in evidence for purposes of illustration only.

Voir Dire

Q. (By Mr. Blewett): Mr. Wellman, does this bit which you have drawn in Exhibit #2 have the same shank, so to speak, and curb strap?

A. No, it does not have a shank at all. It has

(Testimony of E. G. Wellman.)

two round rings as I have designated, at the end of the bit.

Q. And a chin strap? [19]

A. Yes, you can put them on or you can use them without. When we are breaking colts you use them without.

Mr. Blewett: Subject to the same qualifications I have no objection.

The Court: Plaintiff's Exhibit #2 is received for illustrative purposes.

(Whereupon Plaintiff's Exhibit #2, being an illustration of a bit, was received into evidence.)

Q. (By Mr. Bretz): Now with regards to the snaffle bit that we are talking about, have you ever used that on horses that are rented to the public?

A. Yes, we certainly do.

Q. And you also, I take it, use a grazing bit?

A. Right.

Q. Do you use a curb strap with your snaffle bit on the horses that are rented? A. No.

Q. You don't use a curb strap? A. No, sir.

Q. Is there any reason for that?

A. There is. We usually rent those to children, and sometimes they want to play, some of them seven or eight or nine, and they can get hold of the rein and the horse will go right down the trail following the horse in front of it. That is why we use it. [20]

Q. In other words, a rider could use as much pressure on them, on the reins as they want?

(Testimony of E. G. Wellman.)

A. On that particular type of bit.

Q. On the snaffle bit, and it wouldn't particularly phase the horse?

A. Yes, sir. If you said whoa the horse would stop dead still. They are fifteen to twenty years of age.

Q. Do you ever rent horses that are younger than that to the general public?

A. Certainly.

Q. Are you acquainted with the plaintiff in this action?

A. I met the gentleman yesterday, yes.

Q. And I believe you previously gave your deposition about this particular case, did you not?

A. Yes.

Q. And do you recall the particular horse that is concerned with this suit?

A. I think so, yes.

Q. Would you tell the jury the age of this horse?

A. At that particular time he would have been coming six in the fall, in August.

Q. A six year old? A. Yes.

Q. Do you still have the horse?

A. I certainly do. [21]

Q. For the record, what do you call the horse?

A. Skeeter.

Q. Skeeter? And what kind of horse is he? Does he have any special breeding?

A. No, he does not. Quarter horse and what we call a cold blood mare.

(Testimony of E. G. Wellman.)

Q. What do you mean by the term "cold blood mare"?

A. It is just a ranch mare who has no particular breeding. We get away from what we call a "hot blood."

Q. Now going back to the subject of bits again, I wonder if you would tell the jury what parts of the bit add to the control of the horse?

A. The bit and chin strap.

Q. In other words, it would be important to have a shank of some length?

A. The shank is there, not very much. You don't need hardly any. It depends how you adjust it.

Q. And the port in the bit, is that important?

A. Not very, no.

Q. You would say that most of the control is through the pressure of the curb strap on the jaw of the horse?

A. Right, because they have two bones here that are very sensitive. That is why they use more hackamores and things instead of a bit.

Q. Do you ever use hackamores? [22]

A. I have rode a good many horses with them, yes, sir.

Q. With regards to the renting of horses?

A. No, sir.

Q. Why wouldn't you use a hackamore?

A. Because the average guest wouldn't know how to use them, what they are meant for even.

Q. The average guest, what is the experience of the average guest?

(Testimony of E. G. Wellman.)

A. I would say eighty-five per cent of our people have never been on a horse.

Q. And do the guests have a tendency to pull on the reins of the horse?

A. Not necessarily, because we usually ask each one have they ever ridden before they get on a horse. If they say "no" we say put the reins over the saddle horn and leave the horse alone.

Q. And do they do that? A. They do.

Q. These horses, I believe you testified usually the ones that are rented follow the guide?

A. Right.

Q. And is that the way they are trained?

A. They are.

Q. So if a rider has the reins over the saddle horn, so to speak, the horse will do whatever the lead horse does? [23]

A. Well, yes, he should. He will follow him, if that is what you mean.

Q. And the rider wouldn't have any control over the horse would he, with the reins there?

A. Not supposed to. We have had guests pull the reins and have them go off the trail. We would rather have them go down the trail than off the trail.

Q. Do you know what type of bit was used on the horse called Skeeter we are talking about?

A. One of these port bits.

Q. The one you have called a mild port?

A. Yes, sir.

(Testimony of E. G. Wellman.)

Q. And did that bit have the six inch shank on it?

A. I think they are about six and a half, to be exact. I think you can look the number up. It is P1005 in any Crocket catalog.

Q. How many years had the horse Skeeter been in service? When I say "service" I mean rented to the general public, in 1956?

A. Well, he would have been used two years. You see usually working a horse like Skeeter, a colt, you can't put them in steady the first year, so you use them part time and see how they are going to go. Maybe they won't turn out good and have to replace them. Before he ever went to the Park he was used at the ranch to find out whether he was suitable. The next year he was used, and the next year 1956 he was ridden. [24]

Q. Do you recall the color of the horse?

A. Yes, I would say sort of dark sorrel.

Q. Would that be about the same color as dark mahogany?

A. Sort of a chestnut, I would say, yes, similar.

Q. Could you also identify it as being maybe light brown?

A. Well, it could be. It depends. Some people would call it that. I would say dark sorrel if I was identifying him.

Q. Now would you say that the horse we are talking about, Skeeter, was trained the same as the other horses?

A. Yes, right.

Q. He had had the same amount of training?

(Testimony of E. G. Wellman.)

A. Yes, he had the sufficient amount of training or he wouldn't have been out at the hitch rack.

Q. He would do the same as any other horse?

A. That is right. Every horse that was at that hitch rack would.

Q. Do you recall the color of the mane?

A. It is a little lighter, and the tail is a little lighter.

Q. Lighter brown? A. Yes.

Q. Do you ever have occasion to use any spade bits on any of these horses there? [25]

A. No. I cut the bit out of one of them with a horse that was brought up from Texas.

Q. Why wouldn't you want to use one?

A. You can break the roof of a horse's mouth with one of those. That is why we don't use them, if a guest got on and pulled back.

Q. Do you ever have occasion to use a roller on any of these bits? A. No, sir.

Q. Never use any roller? A. No, sir.

Q. Now going back to the guides that you employ up there in the park, I wonder if you can tell us if you gave them any instructions respecting their duties?

A. Yes, they are instructed as to inquiring of each guest if they have ridden, as to his ability, if he has ridden. They are also instructed to know the mountains and scenery, what the guest will see on the trip, and also instructed in the care of his horses, each and every one.

Q. I believe you told me a minute ago that the

(Testimony of E. G. Wellman.)

older horses are used for the children and inexperienced riders? A. Inexperienced, yes.

Q. And that would be the horses that are around oh, eighteen or twenty years of age?

A. No, you could put a three year old on this particular horse. [26]

Q. I wonder if you could tell us, just for background here, just what kind of saddles are used up here?

A. Yes. All my saddles I buy from Haiser in Denver. They are a little wonder.

Q. What kind of girths are used?

A. They are mohair.

Q. That is a cloth type of thing?

A. They are better than cloth. Mohair is a pretty good grade of cloth.

Q. Do the guides each check the saddles after the guests leave?

A. They are checked at the time the guest mounts, and in this particular case, yes, the saddle was checked at the end of the lake.

Q. Does the rider have any special instruction in taking care of the saddle?

A. He is asked if he has ridden, and if he says yes, you give him a little more freedom. You can't be too tough with them because if you do they think you are being unruly. So you take their word for a few of the things they can do.

Q. Were you present at Many Glaciers in June, 1956, when Dr. Hargrave was there?

A. I was in the area, yes.

(Testimony of E. G. Wellman.)

Q. Did you observe the transaction or the returning of the horses? [27]

A. I did not.

Q. Were you in a position where you could have?

A. No, I was down at the corral at the time.

Q. And how far would that have been?

A. About three-fourths of a mile from the hotel.

Q. Can you see the hitch rack from the corral?

A. No, sir.

Q. Do the guests ever go over to the corrals to get their horses?

A. They come over and look the horses over and want to know if they can pick out a certain one.

Q. If they select one, is that the one they get?

A. Not necessarily. We are the judge what horse he gets. Unless he is a guest who has been going there three weeks and we know he can ride, then it might be different.

Q. We have been talking about experienced and inexperienced riders. What do you interpret the word "experienced rider" to mean generally there?

A. Well, we have had people say they are experienced riders and get on them the wrong side of the horse. If we know whether he has ridden and watched him ride, we cannot know until we watch someone.

Q. So if a man told you he was an experienced rider, you would still want to see what he could do?

(Testimony of E. G. Wellman.)

A. You bet you. [28]

Q. And that is part of the instruction, is it, of the guides, to inquire about it?

A. About all you can do is ask them if they have ever ridden. That is about all you can do.

Q. That is about the extent of it?

A. That is right.

Q. Would the horse we are talking about, Skeeter, would he be a suitable horse for the use of children?

A. Yes, yes.

Q. And he is rented to children?

A. That is right, right along with the rest of them.

Q. And they would use the snaffle bit we talked of?

A. We would use a port bit. After we get a horse going with that type of bit we don't change it.

Q. You always use the mild grazing bit?

A. Right.

Q. Is the bit that is used on the horse one that stays with him, that is assigned to him, is that right?

A. In our stables at the place where we keep our saddles, each horse has a peg. Each peg is marked with the horse's name. Each bridle is adjusted to that horse, and it had better stay there. If I find it different, somebody is going to be missing. You have to adjust your saddle over again,

(Testimony of E. G. Wellman.)

and each thing has to be readjusted to each horse in order for it to be satisfactory. Each one has its separate duties. They have their separate pad, separate everything. [29]

Q. You have no actual first hand knowledge of the transaction, I believe you testified, that is pertinent to this lawsuit? A. That is right.

Mr. Bretz: I think that is all we have, Mr. Wellman.

Mr. Blewett: It is my understanding under the rule I can't ask him any questions.

The Court: I might say the only exceptions I make to that is where it is necessary to explain something. I don't believe there is anything here, so that is correct. This might be a good time to take a recess. I might suggest to counsel he let the marshal know who will be the first witness after the recess so that they may be here.

Mr. Kouri: Mr. Dillon will be our next witness.

The Court: Court will be in recess fifteen minutes. (Jury admonished.) Court will be in recess fifteen minutes. (10:45 a.m.)

(Whereupon at 11:00 a.m. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, by virtue of rule 43B, we would like to call Mr. Dillon as an adverse witness. [30]

VIRGIL T. DILLON

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury? A. Virgil T. Dillon.

Q. Where do you live?

A. Cutbank, Montana.

Q. How long have you lived there?

A. About thirty years.

Q. And what is your occupation?

A. Well, a horseman I would say.

Q. And how long have you been in that particular occupation and business?

A. Practically all my life.

Q. You are now an employee of Mr. Wellman, of Wellman Enterprises, are you not, sir?

A. No, sir.

Q. You were on June 23, 1956?

A. That is seasonal work.

Q. Yes, sir. My question is were you an employee of Mr. Wellman's in June, 1956?

A. Yes, sir.

Q. How long had you worked for Mr. Wellman?

A. Since he has operated the concession there.

Q. About how long had that been? [31]

A. Up to that time it was about eight years.

Q. And you worked in that in what capacity?

A. As a wrangler.

Q. At what place? A. Many Glaciers.

(Testimony of Virgil T. Dillon.)

Q. But you are not employed for him at this time? A. Right at present, no, sir.

Q. Will you be employed the coming season, in June? A. Perhaps.

Q. Have any arrangements been made to that effect? A. No, sir.

Q. But you do plan to go to work for him this coming season? A. Yes, sir.

Q. You realize you are not a party to this suit?

A. I realize that, sir.

Q. You are a witness and were summoned to come here by your employer, Mr. Wellman?

A. I do not know how the summons read, but I got a summons anyway.

Q. And you were asked to appear?

A. Yes.

Q. Who came here with you?

A. Mr. Wellman. [32]

Q. And how did you come, sir.

A. In his car.

Q. Did you have a summons served upon you by a Federal marshal or a deputy marshal?

A. Well, it must have been some kind of a marshal. I never questioned him. He just handed me the summons and walked off.

Q. Did they tender any money to you?

Mr. Blewett: I object to that as irrelevant, incompetent. It has no bearing on the issues.

The Court: Objection sustained.

Q. During the recess just a moment ago, Mr. Dillon, after Mr. Wellman testified you were out

(Testimony of Virgil T. Dillon.)

in the hall at the end of the hall talking to Mr. Wellman, were you not? A. Yes, sir.

Q. Now in regard to confining your testimony to June of 1956, you were working for Mr. Wellman?

A. Yes, sir.

Q. In the role of a guide? A. Yes, sir.

Q. Do you remember the particular day of June 23rd of 1956?

A. I don't quite understand that question. What kind of day do you mean, the weather?

Q. Do you know Doctor Hargrave, the plaintiff here? [33]

A. Yes, I have met Mr. Hargrave and his daughter.

Q. Do you recall what month it was when you met them? A. In June.

Q. Do you recall the day?

A. Not particularly.

Q. Approximately? A. Approximately.

Q. The early part, middle part, or latter part of the month?

A. I would say it was around the middle part.

Q. And what was the occasion upon which you were meeting them, Mr. Dillon?

A. To take them for a ride.

Q. And did they approach you about going for a ride on some mounts? A. Yes, sir.

Q. And did they have a particular hour in mind, and any particular place to go to?

A. Yes, sir.

(Testimony of Virgil T. Dillon.)

Q. What hour did they state they would like to go?

A. Right away. That was during the noon hour, almost the noon hour.

Q. Did you have scheduled trips? A. Yes.

Q. Was the noon hour a scheduled trip? [34]

A. No, sir.

Q. And did you then make arrangements to take them during the noon hour? A. Yes, sir.

Q. Who all went?

A. Mr. Hargrave and his daughter and myself.

Q. Were the horses saddled up and ready to go?

A. Yes, sir.

Q. Who did you pick the horse for first?

A. Mr. Hargrave.

Q. What kind of horse did you pick for Dr. Hargrave? A. Oh, a gentle horse.

Q. Would you know the name of the horse?

A. I think we called him Skipper.

Q. Skipper? A. Yes.

Q. And what color was the horse?

A. Chestnut.

Q. Chestnut? And what color was the mane?

A. Kind of a light color.

Q. What kind of saddle did the horse have?

A. Western saddle.

Q. You checked the horse and then brought him forward. Did you make any arrangements with reference to the saddle?

A. Not until I had Mr. Hargrave mount. I al-

(Testimony of Virgil T. Dillon.)

ways ask them [35] if they can ride, and a few questions that are necessary.

Q. Had that particular horse been ridden that day before? A. Yes, sir.

Q. And did he mount the horse? A. Yes.

Q. Did he mount on the proper side, the left side? A. Yes, sir.

Q. Did you ask him if he had had any experience in riding horses?

A. I just answered that question.

Q. I beg your pardon, sir.

A. I just answered that question. I said yes, I inquired if he could ride.

Q. And then he mounted, and then what did you do? A. I adjusted his stirrups.

Q. Were they shorter or what?

A. They were longer.

Q. And how much did you take up on the stirrups?

A. Perhaps two and a half inches.

Q. On each side, each stirrup?

A. Yes, sir.

Q. Did you check the cinch?

A. Yes, sir, naturally that is my job.

Q. What kind of fabric is the cinch made of?

A. Mohair. [36]

Q. How old was the saddle?

A. Perhaps a year.

Q. How old was the cinch?

A. It came with the saddle when it was new.

(Testimony of Virgil T. Dillon.)

Q. Then you adjusted the stirrups and he was ready to go? A. Yes, sir.

Q. Then what did you do, Mr. Dillon?

A. Got on my horse and we rode off.

Q. What about the young lady?

A. She was already made ready to go.

Q. Did you make any adjustments on her stirrups? A. No, sir.

Q. What kind of saddle did she have?

A. Western saddle.

Q. And what color was her horse?

A. A bay I believe.

Q. A bay?

A. Yes. There are a variety of bays, light and dark.

Q. And how old was that horse?

A. About six.

Q. And you said Skipper was about how old?

A. I think he is about seven.

Q. Now? [37]

A. Yeah.

Q. And what color horse did you ride?

A. Grey, iron grey.

Q. Is that your regular mount?

A. Yes, I have rode him for ten years now.

Q. How old is he?

A. He is perhaps fourteen.

Q. You have always used him as what you call a lead horse, haven't you? A. Yes, sir.

Q. That is, when you take people on these mounted tours you are in the lead and the other

(Testimony of Virgil T. Dillon.)

horses are behind, or the guests or patrons and the other horses follow the lead horse?

A. That is right, yes, sir.

Q. How many times had Skipper been out that day prior to this noon hour?

A. He hadn't been out that noon hour.

Q. You probably misunderstood me. I believe you said Skipper had been used that day?

A. That is our regular nine o'clock trip in the morning.

Q. How long did that take?

A. Perhaps two and a half hours.

Q. Had the tour just been back?

A. Yes, a short while.

Q. Had you guided that tour? [38]

A. No, sir.

Q. What about the horse that the young lady, Ann, was on, had it been on the previous tour that morning?

A. Yes, sir.

Q. Had your horse? A. Yes, sir.

Q. But some other guide had ridden your horse?

A. No, sir, nobody rides my horse but myself.

Q. Your horse had not been on the tour that morning?

A. That is right.

Q. They informed you that they desired to go to Josephine Lake?

A. Yes, sir.

Q. And then you all started off? A. Yes.

Q. About what time would you say you mounted?

A. About a quarter of twelve, somewhere like that.

(Testimony of Virgil T. Dillon.)

Q. When you left were you there at what you called the hitching post? A. Yes, sir.

Q. How far is that from the stables?

A. Perhaps a little over half a mile.

Q. Who saddles up the horses?

A. All of us do. That is our job.

Q. Had you saddled up any that morning? [39]

A. Yes, sir.

Q. How many?

A. Well, I know I saddled my own, because I wrangled horses.

Q. Did you saddle the one Dr. Hargrave rode?

A. No, sir.

Q. Or the one Ann rode? A. No, sir.

Q. How many horses did you have?

A. Perhaps twenty.

Q. How many were saddled up that morning?

A. We saddled twenty.

Q. Now you left about a quarter after twelve?

A. No, quarter before.

Q. Excuse me, a quarter before twelve. And who was in the lead?

A. The guide, that is myself.

Q. How was the weather that day?

A. Very good.

Q. Was there a particular trail that you took?

A. Yes, sir.

Q. And how did you start out, at what pace?

A. A walk.

Q. How far was the Doctor behind you?

A. Right behind me. [40]

(Testimony of Virgil T. Dillon.)

Q. What about the young lady, Ann?

A. She was right behind the Doctor.

Q. And you proceeded that way for how many minutes, or such?

A. Clear to the lake.

Q. Did you stop any on the way?

A. No, I didn't.

Q. On the way to the lake did a certain incident arise where Doctor Hargrave dropped some film?

A. I do not know whether it was film or not, but it was something, some part of his camera.

Q. He dropped something and his daughter Ann got off her horse and picked it up and handed it to him?

A. Yes, sir.

Q. Did you have a conversation then with the Doctor?

A. No, sir.

Q. Did you observe at any time, that is when you were in the lead, at any time around that time, whether Dr. Hargrave's horse began to trot a little bit then?

A. No, he couldn't get by me, and I was in a walk, my horse.

Q. So you were in a walk all the way?

A. Yes, sir.

Q. Did you have a conversation with the Doctor when you all got to Josephine Lake? [41]

A. No, sir.

Q. Did you remain on your mount?

A. No, sir.

Q. You dismounted?

A. Yes, sir.

(Testimony of Virgil T. Dillon.)

Q. Did the Doctor get off his horse?

A. Yes, sir.

Q. He took some pictures?

A. That was his object of going up there.

Q. Did you talk to him while he was taking his pictures? A. No, sir.

Q. Do you know how many pictures he took?

A. No.

Q. Approximately how long were you all there?

A. About fifteen or twenty minutes.

Q. Ann stayed on her horse, didn't she?

A. No, I believe she got off too.

Q. She dismounted? A. Yes, sir.

Q. But at first you got off, and then Dr. Hargrave? A. Yes, sir.

Q. Then later she did? A. Yes.

Q. Did she do anything with reference to taking any pictures or was she just enjoying the scenery?

A. No, she was just looking at the scenery. [42]

Q. It is a very beautiful area, isn't it, Mr. Dillon? A. Yes, sir.

Q. Do you know how many pictures Mr. Hargrave took? A. No, sir.

Q. About how long would you say you were there? A. Fifteen or twenty minutes.

Q. And did you during that time, while you were there did you check the cinch on your horse?

A. Not necessarily, no.

Q. Did you check the cinch on Dr. Hargrave's?

A. No, sir. I don't have to. I know how they are before I get there.

(Testimony of Virgil T. Dillon.)

Q. Did you check the cinch on the young lady's horse? A. No, sir.

Q. Did you check anything with regard to the equipment on any of the horses?

A. How do you mean that, sir?

A. The bridle, bit or saddle?

A. Certainly.

Q. What?

A. Well, everything in general.

Q. You checked everything?

A. Certainly.

Q. Out there at the lake? [43]

A. Yes, sir.

Q. How far was it that you had rode up there?

A. A little over a mile perhaps.

Q. And what was the temperature would you say? A. Nice, and a little breezy.

Q. All right, then you got ready to come back?

A. Yes, sir.

Q. Did Doctor Hargrave have any difficulty mounting? A. Yes, sir.

Q. Isn't it true that he attempted to mount and the saddle came over and slipped over?

A. No, sir.

Q. And then you came over and said grab the mane? A. No, sir.

Q. And then you helped him on?

A. I helped him on, but I did not say all that.

Q. All right, let's take it step by step. Didn't the saddle slip? A. No, sir.

Q. When he grabbed the horn?

(Testimony of Virgil T. Dillon.)

A. No, sir.

Q. All right, didn't you tell him to grab the mane? A. No, sir.

Q. What did you tell him?

A. I did not tell him much of anything, but he was just [44] getting on the saddle, I boosted him on the saddle and that is when the saddle turned.

Q. And then the saddle turned to the right then?

A. Yes, sir.

Q. About how much?

A. Oh, I would say three or four inches.

Q. All right, was he then securely on the saddle?

A. Yes, sir.

Q. What did you do then?

A. I adjusted the cinch and put the saddle back.

Q. How much did you take up?

A. Not too much.

Q. About how much?

A. Oh, perhaps you can always take in an inch or two.

Q. Of course you have been in this business a long time? A. Yes, sir.

Q. And way back there before you started didn't the Doctor tell you he hadn't had very much experience riding?

A. None of them have that have come up there.

Q. I am asking you a question about Doctor Hargrave?

A. Yes, that is what he told me.

Q. All right, now you have been in the business a long time, haven't you? A. Yes, sir. [45]

(Testimony of Virgil T. Dillon.)

Q. And you know even if you take a short trip like that that the horse will certainly, there will be a little give—in other words, I am not implying they lose some weight, but that exercise will necessitate at times the taking up of the cinch maybe an inch or so, isn't that true? A. That is true.

Q. And you took it up how many inches?

A. I didn't take it up at all along the trail until we got to Lake Josephine.

Q. You took it up how many inches?

A. Perhaps an inch.

Q. You and Doctor Hargrave did not have any other conversation there at the lake?

A. No, sir.

Q. You did not say anything to him?

A. No, sir.

Q. Did you observe him when he got off?

A. Naturally.

Q. When he got off at the lake?

A. Yes, sir.

Q. He got off all right, didn't he?

A. Yes, sir.

Q. Now so we start back? A. Yes.

Q. And about what time is it now? [46]

A. Well, it is getting about 12:30 I imagine somewhere close there.

Q. And going up there was there a particular trail that you stayed on all the way through?

A. Yes, sir.

Q. Lots of foliage, isn't there, on the right and left of the trail? A. Not too much.

(Testimony of Virgil T. Dillon.)

Q. In a certain area, isn't there?

A. No, it is a wide trail.

Q. I am talking about the trees and bushes that are along part of the trail?

A. Yes, sir, the scenery is beautiful, yes.

Q. And it was all nice and green that time of the year?

A. Yes.

Q. And was it a straight one or a curved trail? Did it curve in any place?

A. Well certainly.

Q. And how many places?

A. I never counted them.

Q. Would you give us your best recollection?

A. No, sir, I do not know.

Q. A few, or several?

A. A few I would say.

Q. And as a result of that, and in view of the trees [47] and the scenery, the guide can be going ahead at a short distance ahead and the view will be obscured from those behind, with those curves?

A. No, sir.

Q. They are not high enough even with a man or a woman on a horse to hide them?

A. I wouldn't say on the wagon road. It is an old wagon road.

Q. Is it deep?

A. No, sir, level.

Q. Shallow?

A. Level.

Q. How wide is it?

A. I would say about six or eight feet wide perhaps.

Q. Then two could ride abreast if they wanted to?

A. Yes, if they were allowed to.

(Testimony of Virgil T. Dillon.)

Q. But that is not allowed? A. No, sir.

Q. Because you were riding the lead horse and the others were following? A. Yes.

Q. If your lead horse started going at a rapid pace, the others will likewise, isn't that true?

A. No, sir, because I never allow that.

Q. What kind of bit did you have on your horse? [48]

A. A snaffle bit.

Q. What kind of a bit was on the Doctor's horse? A. Grazing bit.

Q. Describe to us what a snaffle bit looks like?

A. What a snaffle bit is?

Q. Yes, sir.

A. Well, it is a bit with round rings on each cheek, and bar through the mouth and a break in the middle. That is what we call a snaffle bit.

Q. That is what you had?

A. That is what I use all the time.

Q. And the Doctor had a grazing bit?

A. Yes.

Q. What about the description of that, sir?

A. Well, it has a straight bar across through the mouth, with about seven inch cheeks on it.

Q. Mr. Dillon, I wonder would you mind making just a little sketch. I know you are probably not an artist, I am not either, but I mean a sketch first of the snaffle bit and the grazing bit, if you would please, and just illustrate a sketch of it.

A. (Drawing.)

Q. What is this?

(Testimony of Virgil T. Dillon.)

A. That is the snaffle.

Q. What are you going to draw over here? [49]

A. The grazing bit.

Q. I am going to give you a separate piece of paper. Would you draw the shank on that?

A. There is no shank.

Mr. Blewett: I have no objection subject to the same qualifications heretofore made.

The Court: It is received for illustrative purposes subject to the continuing objection.

(Whereupon Plaintiff's Exhibit #3, being an illustration of a bit, was received into evidence.)

Q. Now please, sir, draw that grazing bit sketch, a sketch of it?

A. Approximately it will be. (Draws.)

Q. Certainly.

A. That is a break in there.

Q. What kind of a port is that?

A. Small port.

Q. Small port? A. Yes.

Q. You may have your seat again.

A. (Resumes stand.)

Mr. Kouri: Would you please mark that, sir?

Mr. Blewett: May I ask him a question, your Honor?

The Court: You may.

Q. (By Mr. Blewett): Mr. Dillon, is this [50] illustration you have drawn here the bit itself, or does it include that chin strap, or is the chin strap a part of the bit? A. This is just the bit.

(Testimony of Virgil T. Dillon.)

Mr. Blewett: I have no objection subject to the same qualifications.

The Court: Plaintiff's Exhibit #4 is received for illustrative purposes, subject to the same objection.

(Whereupon Plaintiff's Exhibit #4, being an illustration of a bit, was received into evidence.)

Q. (By Mr. Kouri): I am handing you Exhibit #4, for the purpose of the record, the little sketch you made, Mr. Dillon, and you have put the shanks on the bit here, and I am handing you this exhibit which you drew as the grazing bit?

A. Yes, sir.

Q. And that is the type of bit that Doctor Hargrave had on his horse? A. Yes, sir.

Q. What is the approximate length of the shank?

A. Seven inches I imagine, six and a half or seven inches.

Q. What metal is it made of?

A. A lot of them are aluminum, steel or silver, whatever you have.

Q. You don't recall what that particular one was? [51] A. No.

Q. Did it curve?

A. The shanks barely curved slightly.

Q. And there are some that are longer, that type of bit that are longer?

A. They are all regular bits.

(Testimony of Virgil T. Dillon.)

Q. They don't make them longer than the seven inches plus?

A. That is what we use. No, sir.

Q. What is the purpose of the length of it?

A. The purpose of the grazing bit is to let the horse loose to graze, or to tie him in a stall with a bridle on, and he can still eat.

Q. What about riding is concerned?

A. They are not too severe a bit.

Q. What about riding one, what is the purpose of the length? A. The length of the shank?

Q. Yes, sir?

A. That is to control your horse.

Q. Control? A. Yes.

Q. And this has a chin strap with it?

A. Yes, sir.

Q. What is the purpose of the chin strap? [52]

A. That is to pull your shanks back against his jaw behind, to tighten up.

Q. Do you have any part leather at the ends, in the middle for the strap?

A. It varies. Not necessarily.

Q. Have you seen those? A. Yes.

Q. Are they still used?

A. Not necessarily.

Q. What is used more? A. Leather.

Q. What kind of leather is used on the strap?

A. Just leather usually.

Q. And if it is pulled continuously over a period of say years with that leather strap, it is going to have some effect on the horse's lower jaw then?

(Testimony of Virgil T. Dillon.)

A. Yes.

Q. In fact, you have seen cases where it is sort of—over a period of years it has affected the nerves in there? A. Yes, sir.

Q. Did you use any type of roller? A. No.

Q. You have seen them? A. Yes, sir.

Q. Aren't they the type that have the port like you [53] have described here on this bit, and there is a little blunt metal roller that is dull and won't hurt the horse's mouth? A. Yes, sir.

Q. What are they used for?

A. To my knowledge I do not know. I have never used one.

Q. But you have seen them? A. Yes.

Q. They don't cause any injury to the horse's mouth? A. No.

Q. You do have more control with them?

A. Not necessarily.

Q. Mr. Dillon, getting back to the shank again, isn't it true that the longer the shank, the more control you would have? A. Naturally.

Q. And the more of the curve on the shank of the bit, the more control you would have of the horse? A. No, sir.

Q. You have bits you use there with children in riding? A. Yes, sir.

Q. What type are they? A. Snaffle bits.

Q. Will they stop a horse?

A. Yes, sir. [54]

Q. A young child, say ten years old, will they stop them? A. It is their ability.

(Testimony of Virgil T. Dillon.)

Q. Isn't it true that the whole setup you have there for the horses for the guests to follow the lead horse is for the bit to be actually ineffective, whether it be snaffle or grazing bit?

A. Not necessarily.

Q. But lots of times though they are supposed to follow the lead horse? A. They do, yes.

Q. That is the rule?

A. It is not necessarily the rule, but that is what we follow.

Q. That is the custom?

A. That is the custom of the trail horse, yes, sir.

Q. And that is what you abided by on that day?

A. Yes, sir.

Q. Going up and coming back?

A. Yes, sir.

Q. All right, coming back to about twelve thirty? A. Yes.

Q. You take the lead? A. Yes, sir.

Q. Who is next? [55]

A. The Doctor.

Q. And then the young lady, little Ann, his daughter? A. Yes, sir.

Q. Had the horses been fed?

A. Yes, sir.

Q. At what time?

A. We feed them twice a day, morning and evening.

Q. What time that morning were they fed?

A. Oh, perhaps the time we get in with them would be approximately seven o'clock.

(Testimony of Virgil T. Dillon.)

Q. And then what time in the evening?

A. Five thirty.

Q. You all came back through the same trail?

A. Yes, sir.

Q. Does that trail have a particular name?

A. The Josephine Lake trail, yes, sir.

Q. Did you stay within a close distance of each other?

A. Yes, sir.

Q. And what pace were you going?

A. Walk.

Q. And the others behind you?

A. Were walking too.

Q. Did you have any particular appointment back at either the hitching post or at the hotel?

A. Not until two o'clock, no, sir. [56]

Q. Had you eaten your lunch?

A. No, sir.

Q. What time do you usually eat lunch?

A. During the lunch hour, the noon hour rather.

Q. When is the noon hour? When do you usually eat?

A. Between twelve and one.

Q. How long did it take you to go up there?

A. Oh, about three quarters of an hour, not much more.

Q. And likewise it would take you coming at the same pace the same length of time to come back?

A. Yes, sir.

Q. It would put you about one fifteen coming back?

A. We left there perhaps earlier. We were close to the lake at twelve thirty.

(Testimony of Virgil T. Dillon.)

Q. You came on down the trail back towards the hitching post? A. Yes, sir.

Q. How far is the hitching post from the hotel?

A. Oh, I would say—there are a lot of steps there. I never counted them. I would say fifty yards perhaps from the lobby of the hotel.

Q. You eat in the hotel? A. No, sir.

Q. Where do you eat?

A. In our own camp. We have our camp there.

Q. Now you stated you were ahead there coming back with Dr. Hargrave and his daughter. About how far apart were you three?

A. About a horse length. About the same distance as when we went up.

Q. Did you continue that all the way through?

A. Yes.

Q. Just about a horse length apart?

A. Yes.

Q. Until you got back to the hitching post?

A. Yes, sir.

Q. No stops? A. Yes, sir.

Q. Well, I just got through asking you. Maybe I am not making myself clear.

A. You said did they follow that way back to the hitching rack. But there was a stop.

Q. Were you looking behind from time to time?

A. Practically all the time.

Q. Your horse could go right on back without any trouble at all on that distance, he had made the trip many times hadn't he, or she?

A. Without a rider you mean?

(Testimony of Virgil T. Dillon.)

Q. Yes. A. No, I don't think so. [58]

Q. Well, you said you had been up there for quite some time?

A. Yes, sir, but how do you mean, me turning the horse loose?

Q. If you were acquainted with that trail, you had gone up it many, many times?

A. Yes, but I don't turn the horse loose without a rider.

Q. I am asking, you have done that many times?

A. Yes.

Q. Over a period of many years? A. Yes.

Q. Do you mean to tell me if you got off that horse and called or clapped your hands, he wouldn't go ahead to the hitching post?

A. He would probably go to the first bunch of grass.

Q. He would eventually go to the hitching post?

A. Eventually, maybe a day or two later.

Q. All right, you said that there was a stop there? A. Yes.

Q. At one point there little Ann road up to the side of you? A. No, sir.

Q. Did she ride up to the side of you at any time? A. No.

Q. She at that occasion I am talking about, asked you [59] let's go just a little faster, and you without turning around to see whether the Doctor was behind you even, and who was obscured from view, spurred your horse on and took off at a gallop, and so did her horse and so did the Doctor's?

(Testimony of Virgil T. Dillon.)

Mr. Blewett: I understand there is a lot of latitude here on the right to cross examine an adverse witness, but I think the question just propounded assumes a state of fact which has not yet been presented in this case, and it is a compound question. This witness may not be as educated as Mr. Kouri. I would like Mr. Kouri to ask him one question at a time and not to assume a state of facts not yet in this case. I would like him to be admonished to do that.

Mr. Kouri: I will certainly reframe the question, your Honor.

The Court: I think it would be well to divide the question.

Mr. Kouri: Yes, sir. Thank you, sir.

Q. (By Mr. Kouri): You did, Mr. Dillon, go into a run, did you not? A. No, sir.

Q. You deny that you went into a run with your horse? A. Yes, sir.

Q. Did you go into a trot?

A. No, sir, not with my horse.

Q. Did you go into a gallop? [60]

A. No, sir.

Q. Did you go into a canter? A. Canter?

Q. Yes, sir? A. No.

Q. You then heard the holler or the call from Doctor Hargrave and stopped your horse, didn't you? A. No, sir.

Q. And you heard little Ann holler to stop?

A. No, sir.

Q. And you turned around in your horse, and

(Testimony of Virgil T. Dillon.)

turned backward, and then Dr. Hargrave's horse stopped? A. No, sir.

Q. And you said "Now what has happened?"

A. No, sir.

Q. Sort of I mean, you said "Now what happened?" A. No.

Q. In other words, going up there don't you remember this, that Dr. Hargrave's horse began to jump at times a little trotting, and he stopped him and kind of told you about it, and you looked back and you didn't like that necessarily? A. No.

Q. So on this incident you said "Now what happened?"

A. No, I didn't. Not very many words were exchanged with me and Mr. Hargrave. [61]

Q. All right, you will get a chance through your counsel to say whatever you like. He was sitting up there on his horse and paralyzed, wasn't he?

Mr. Blewett: I object to this. This cross examination can go on under proper rules, but by this Mr. Kouri is assuming with this witness a state of facts not in this case, propounding questions to him on an evidence basis that is not even in this case yet. And the question of whether the Doctor is paralyzed is a question in issue. I object and ask that counsel be admonished.

The Court: I don't think this witness will know he was paralyzed.

Mr. Kouri: I will question him on his observations.

The Court: Whatever he observed.

(Testimony of Virgil T. Dillon.)

Q. (By Mr. Kouri): From your observation was he sitting just up there not moving?

A. He was nearly off his horse.

Q. What did you do then?

A. I did not do anything. He did not give me time. He said "I want to get off my horse." I said that is perfectly all right, Mr. Hargrave. I said it is not far from the hotel, just stroll right on down. In the meantime he changed his mind and we went on to the hitch rack.

Q. I know it has been some time ago, and you have had [62] a lot of guests, but didn't he say he couldn't get off the horse? A. No, sir.

Q. And you asked him though would you like to walk down the rest of the way, taking it easy? Do you admit that?

A. Not the exact words, no.

Q. You offered to help him off?

A. Help him off, yes.

Q. But he sat there?

A. He sat right back down in the saddle, yes, sir.

Q. And did you look at his saddle to see whether it was on straight or not?

A. Certainly, I could see it.

Q. It was off about four or five inches, wasn't it? A. No, sir.

Q. And didn't little Ann call your attention to it? A. No, sir.

Q. And you did not straighten it out?

A. At Lake Josephine I did.

(Testimony of Virgil T. Dillon.)

Q. I mean at this place we are talking about?

A. No, sir.

Q. Then you all came on in there, from there to the hitching post? A. Yes, sir.

Q. And then back at the place where he was sitting there on the horse, Doctor Hargrave, didn't he tell you that [63] he thought maybe he hurt some spurs in his back? A. Spurs?

A. Yes, sir.

A. Oh, I don't remember that.

Q. Were the reins in his hand?

A. Reins? He wasn't wearing spurs.

Q. Didn't he tell you he thought he had popped some spurs in his back? A. No, sir.

Q. All right, you are not telling the jury that he did not say that?

A. Not to my knowledge.

Q. All right, he was sitting on the horse. Did he have the reins in his hands? A. Yes, sir.

Q. How did he look from your observation, his facial expression?

A. He looked like he was worried about getting off. He had most of his weight off the saddle. That is where he wanted to get off.

Q. But he stayed on? A. Yes.

Q. What kind of wearing apparel did you have on? Did you have jeans? A. Yes, sir. [64]

Q. You had your boots on? A. Yes, sir.

Q. Did you have spurs? A. Yes, sir.

Q. What created then this situation, if there wasn't any running? A. Created it?

(Testimony of Virgil T. Dillon.)

Q. Yes, sir.

A. Well, he was complaining most of the time as usual. Some people do. So there was no objection from me if he got off and walked or rode or anything else.

Q. You were in the area where the trail makes a bend when all this takes place, weren't you?

A. Yes, sir.

Q. When it all started back there?

A. Yes.

Q. And was he complaining going up there?

A. No, sir, not to me. I have heard some conversation between him and his daughter, but I never paid any mind to that.

Q. But he was complaining coming back?

A. No, sir, not to my knowledge.

Q. When did all this complaining start?

A. When I stopped my horse and he said "I want to get off the horse." [65]

Q. Why did you stop?

A. Because he asked to get off the horse.

Q. Where was Ann all this time?

A. She was behind the Doctor.

Q. So you just heard him complaining and you stopped your horse and thought you would go back and then his horse stopped?

A. No, his horse stopped before I ever looked back, because he was right behind me. So I did not have to look back too far.

Q. But you could tell looking at him he looked worried?

(Testimony of Virgil T. Dillon.)

A. I do not know how a person looks getting off a saddle, but most of his weight was on his stirrup getting off the saddle.

Q. Did you look at the stirrups to see if the ball of his feet were firmly in the saddle?

A. No, I didn't.

Q. Did you straighten out the cinch again?

A. No, sir, it wasn't necessary.

Q. Did you help adjust the saddle in any way?

A. No, sir, I never got off my horse.

Q. You never got off? A. No, sir.

Q. Then you all started back to the hitching post? A. That is right. [66]

Q. And when you got there who got off first?

A. I did.

Q. And then what happened with reference to you and Dr. Hargrave?

A. He got off next.

Q. Did you help him? A. Yes.

Q. And did he say anything then?

A. No, sir, he never said a word to me.

Q. Did you say anything? A. No.

Q. Did he get off? A. Yes.

Q. Then Ann got off?

A. She was already off.

Q. He paid you with a bill and you did not have any change?

A. He paid me with four dollar bills.

Q. You did not go down and get some change?

A. I did not.

Q. And the fee was what?

(Testimony of Virgil T. Dillon.)

A. Four dollars.

Q. And he paid you with four dollars?

A. Yes, sir.

Q. And then where did you go? [67]

A. I went down to the hotel.

Q. Did they go on away?

A. Yes, like that (snapping fingers).

Q. What do you mean?

A. They seemed to be in a hurry. They never said a word to me when they got off their horses.

Q. You did observe the Doctor, and from that observation you saw that same look on his face?

A. No, I never pay much attention to their looks.

Q. Just a few more questions, Mr. Dillon?

A. Yes, sir.

Q. How was Ann, the young lady, his daughter, how was she dressed?

A. She had riding togs on.

Q. How was the Doctor dressed?

A. In a suit.

Q. What kind or color?

A. Kind of a light brown I would say.

Q. Now just answer this please, sir?

A. Yes, sir.

Q. Just answer this yes or no, sir. Have you since that time talked to any of the representatives or agents of the defendant, Wellman Enterprises?

A. How do you mean that, sir?

Q. I am trying to make it as simple as possible.

A. Yes, sir, I have.

(Testimony of Virgil T. Dillon.)

Q. How many occasions?

A. Several, I imagine.

Q. Where? A. In various places.

Mr. Kouri: I believe that is all.

The Court: Do you have any at this time, Mr. Blewett?

Mr. Blewett: Do I understand I can cross examine?

The Court: There were a few instances where he wanted to make an explanation. I will permit that, or you can wait until your own examination.

Cross Examination

Q. (By Mr. Blewett): One thing, you referred to the horse as Skipper. Was it Skipper or Skeeter? A. Skeeter.

Q. You mentioned Skipper.

A. The names were close.

Mr. Blewett: That is all I have now.

The Court: Well, I think perhaps it would be just as well to take a recess now. Court will be in recess until one forty-five (Jury admonished.) Court is in recess until one forty-five. (11:50 A.M.)

(Whereupon at 1:45 P.M. Court was resumed pursuant to recess, at which time the plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, we would like at this time to call as our next witness the plaintiff, Dr. Hargrave.

DR. ROBERT L. HARGRAVE

having been duly sworn, was examined:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury? A. Robert L. Hargrave.

Q. Doctor Hargrave, what is your profession?

A. Physician and surgeon.

Q. Where do you live, sir?

A. Wichita Falls, Texas.

Q. How long have you lived there?

A. Since 1913.

Q. How long have you practiced medicine in Wichita Falls, Texas? A. Since 1934.

Q. Do you maintain offices there at this time?

A. Yes, sir.

Q. Do you specialize in any particular branch of medicine?

A. I do general practice and I am a specialist in general surgery. [70]

Q. What degrees did you receive prior to the time you went to Medical school?

A. I have one degree before I went to medical school, a bachelor of science degree.

Q. Do you have a masters degree?

A. Yes, sir.

Q. In what field?

A. That is in the medical field, in pathology.

Q. All right, sir, what medical school or schools are you a graduate of?

A. I am a graduate of Tulane University medi-

(Testimony of Dr. Robert L. Hargrave.)

cal school and I have graduate degrees from the University of Minnesota.

Q. After you graduated from the University of Minnesota did you then intern, do intern work?

A. No, that was post graduate work at the University of Minnesota.

Q. Then after that time what did you do with reference to your profession?

A. After I finished my training I went back home and went in practice.

Q. Had you been affiliated with any of the outstanding hospitals in the nation as a surgeon and physician?

A. Only in my training.

Q. All right, and where were those please, sir?

A. Well, I had a fellowship in surgery at the Mayo clinic. [71]

Q. At Rochester?

A. At Rochester, Minnesota.

Q. And what did you do there with reference to the field of medicine?

A. I had a regular fellowship in surgery.

Q. And how long were you there at Mayo Clinic?

A. Two and a half years.

Q. And thereafter did you have any other fellowships?

A. I had one before that in pathology at the University of Minnesota, in Minneapolis.

Q. Doctor, are you a member of the Wichita County, Texas, Medical Society?

A. Yes, sir.

Q. Are you a member of the Texas State Medical Society?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Are you a member of the American Medical Association? A. Yes, sir.

Q. Do you have any other degrees honorary that have been conferred on you since you have been a practicing physician?

A. Well, I haven't had any really degrees, no.

Q. I am talking about any fellowships?

A. I am a fellow in the American college of surgeons and the American Board of Surgery.

Q. The American Board of Surgery?

A. Yes, sir. [72]

Q. Is that where you stand for an examination?

A. Yes, sir.

Q. Is your license duly recorded in Wichita County, Texas, at the clerk's office there at the Court House? A. Yes, sir.

Q. Now, Doctor, when you first started practicing medicine were you associated with any other member of your family in the practice of medicine?

A. Yes, sir, I was associated with my father.

Q. At that time were you associated with any hospital?

A. Yes, sir, when I first started to practice I was associated with a hospital known as the Hargrave Hospital.

Q. Was that your father who built that hospital? A. Yes, sir.

Q. And now that is called what?

A. My father sold that hospital to some Sisters, and they call it now the Bethania Hospital.

Q. Where were you born?

(Testimony of Dr. Robert L. Hargrave.)

A. I was born at Dieg Texas, Hopkins, Texas.

Q. Where was Mrs. Hargrave born?

A. She was born in Minnesota.

Q. How long have you been married?

A. Since 1930.

Q. Doctor, how long did you live in East Texas?

A. We moved away from there when I was four years old. [73]

Q. Was your father practicing medicine at that time? A. Yes, sir.

Q. Did he have any horses?

A. Yes, sir.

Q. For his professional calls and such?

A. Yes, sir.

Q. After that where did you move to?

A. We moved to Kawana.

Q. And he practiced medicine there?

A. Yes, for five years.

Q. What kind of transportation did he use there for his calls?

A. He used horse and buggy to start with and then later on he bought the automobile, he bought a Ford.

Q. How old were you when you left there?

A. I was eight.

Q. Had you had any experience riding horses up until that time?

A. I don't recall. I don't think so.

Q. After you moved where did you live?

A. Wichita Falls in 1913.

(Testimony of Dr. Robert L. Hargrave.)

Q. Did you have any experience there as a young man riding horses, to any extent?

A. After I got a little older I have ridden horses a few times. [74]

Q. I see. When you were in medical school or prior to that did you have any occasion to ride?

A. I think I rode before I went to the University. I don't believe I was on a horse—I mean I might have been once or twice after I started medical school, except one time I did ride out in Washington State.

Q. What year was that?

A. I rode then for a little while in I think it was 1948 or '49.

Q. Had you ridden any at all from 1948 until say 1956?

A. I don't think so. I don't remember, but I am sure I didn't.

Q. All right, Doctor Hargrave, immediately prior to, within say thirty days of June of 1956, state whether or not you had an occasion to be reading one of the national magazines?

A. Yes, sir.

Q. Do you recall what month that was in, if you recall?

A. I read the national magazine all the time.

Q. But immediately prior to June did you see any illustrated item in the National Geographic in regard to a beautiful scenic place in Montana?

A. Yes, sir.

Q. And did you read that article?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir.

Q. Did it have pictures in the magazine? [75]

A. Yes, sir.

Q. What area was it, sir?

A. Well, it was a story about Glacier National Park.

Q. And did you read the item with interest?

A. Yes, sir.

Q. Did you see any picture of anyone in there that you have seen since? A. Yes, sir.

Q. Who was that? A. Mr. Dillon.

Q. Mr. Dillon who testified here this morning?

A. Yes, sir.

Q. And what connection did he have with this article?

Mr. Blewett: To which we object, your Honor.

Mr. Kouri: I will strike that and reframe it, your Honor.

Q. Was his picture concerning and in regard to the item in the magazine, Mr. Dillon's picture?

Mr. Blewett: I have a right to object here. I am going to object at this time, it is incompetent and irrelevant and if he is going to testify what any magazine said it is hearsay.

The Court: I can't see the relevancy of this.

Mr. Kouri: I was laying the groundwork for the trip up here. [76]

The Court: Objection sustained.

Mr. Kouri: Thank you.

Q. (By Mr. Kouri): After reading that then

(Testimony of Dr. Robert L. Hargrave.)

did you make any plans to make a trip to Montana, or to Glacier National Park?

A. Yes, sir, I did, but I thought I was going to come up here—the fact is I thought we might take a trip to Switzerland, but things were such I did not get to go to Switzerland. I wanted to take a vacation, so we decided to come up to the Canadian Rockies and on the route up there we went through Yellowstone Park and Glacier Park up into the Canadian Rockies.

Q. Prior to your leaving did you learn whether or not any of your neighbors were going up, making the same type trip? A. Yes, sir.

Q. Who was that?

A. Mr. and Mrs. Ryan.

Q. Where do they live from your home?

A. Next door.

Q. What does he do?

A. He is a geologist.

Q. And when did you leave, you and your family leave for the trip?

A. I don't remember the exact time, but it was about [77] June 3rd I think, about June 3rd then.

Q. Incidentally did you exchange ideas on the itinerary with your next door neighbors, and did they with you? A. Yes.

Q. And you made the trip with your family, consisting of whom?

A. I made the trip with my wife and my daughter, Ann.

(Testimony of Dr. Robert L. Hargrave.)

Q. And how did you all decide to make the trip? A. We went by automobile.

Q. All right. Then did you have occasion after coming through Yellowstone of going to Many Glaciers National Park?

A. Yes, sir, going up on the trip we went through Glacier National Park, going into Canada, and then coming back from Canada we went through Glacier National Park coming back home.

Q. Did you stop at any particular place in that vicinity of the Glacier National Park?

A. Going up?

Q. No, sir, coming back?

A. Yes, sir, I stayed there at Glacier near Many Glaciers Hotel.

Q. And you were in what kind of automobile?

A. In a Chrysler.

Q. Do you remember what your license number was? A. Yes, sir. [78]

Q. Would you please tell us?

A. The number was 44, and it was EY 44, because I have had that same number and it is the number I have now. The first part might be wrong, but I know the 44 part is correct.

Q. And did you have occasion to see any friends from home on or about June 23rd?

A. Yes, sir, we saw these neighbors of ours in Glacier Park.

Q. Where did you see them first?

A. The first time we saw them was at their camp ground.

(Testimony of Dr. Robert L. Hargrave.)

Q. And did you run into them or did they look you up, or what?

A. Well, before we went on the trip they knew our license number, and we thought that it was possible that we might cross each other on the trip, because they were going into Canada too.

Q. Yes, sir.

A. And they saw our car parked near this Many Glaciers Hotel and left a note on the car that they were at Swift Current Camp Grounds.

Q. They were with another group, I presume?

A. Yes, they were with a group of students that they were taking up to Canada on a geological tour.

Q. All right. Did you have occasion to go up to where the Hotel is to make inquiries concerning a trip on horses to Lake Josephine? [79]

A. Yes, sir.

Q. Who went with you? Who went with you to make the arrangements?

A. Well, Ann and my wife and myself, we were together in the car.

Q. Did Mrs. Hargrave go with you there and go with you, or did she stay in the car?

A. I do not know.

Q. Well, anyway did you meet the agent that had charge of the horses?

A. I did not meet him, he was there.

Q. He was there and you told him what you desired to do?

A. Yes, sir.

Q. What was that, Doctor?

(Testimony of Dr. Robert L. Hargrave.)

A. I wanted to go to Lake Josephine to take some pictures of it.

Q. And about what time was that?

A. I think it was about eleven o'clock of a morning. It might have been a little after that.

Q. Was it on June 23rd? A. Yes, sir.

Q. 1956? A. Yes, sir.

Q. And what was the man's name that you talked to? [80]

A. I did not know what his name was.

Q. I mean now that you know.

A. His name was Mr. Virgil Dillon.

Q. What did he say when you said you wanted to go then?

A. He said they did not have any trip then, that it would be two o'clock before they had a trip, but then I told Mr. Dillon that I was anxious to go to the Lake to make some pictures before noon because I wanted to get the light shining in the correct position on the mountains to make the pictures good, because if I took the pictures after noon they would be no good, they would be back lit and would not be good pictures. Then Mr. Dillon agreed to take Ann and myself to the lake. The purpose of going to the Lake was to take pictures and for me to see the lake because I had seen pictures of the lake before in the National Geographic Magazine and in other places, and I wanted to see the lake.

Q. All right, sir, did you see any of the horses at that time when you were there in that vicinity by the hitching post?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, they had many horses, several horses.

Q. Were they all saddled up?

A. I don't recall.

Q. Did he then agree to take you, in view of your request?

A. Yes, sir.

Q. And who did he obtain a horse for first? [81]

A. He obtained Ann's horse first.

Q. Did he go get a horse and just bring it, or what happened?

A. It is my recollection that one of the other helpers brought a horse up for Ann and Mr. Dillon did not want this particular horse, and he wanted Ann to have another horse, so he got the other horse for Ann.

Q. Did Mr. Dillon himself actually go get the horse?

A. I can't answer that. I do not know if somebody else brought it.

Q. What color was the horse?

A. Ann's horse was what I call a sorrel horse.

Q. What color horse did Mr. Dillon have?

A. He was on a white horse.

Q. What color horse did they get for you?

A. It was a color about the color of this furniture.

Q. Now for the purpose of the record what would you call it?

A. I would describe it as a dirty brown color, and the horse had a lighter mane.

Q. Did you have a conversation with Mr. Dillon

(Testimony of Dr. Robert L. Hargrave.)

prior to your mounting your horse with reference to your riding experience?

A. Not that I remember, no, sir.

Q. Nothing was said? [82]

A. Not that I remember, no, sir.

Q. Did he ask you if you had riding experience?

A. Not that I remember, no, sir.

Q. Did he mount last or secondly?

A. I do not know.

Q. Did you mount your horse?

A. Yes, sir.

Q. On what side? A. Oh, on the left side.

Q. And was there any adjustments made on the stirrups?

A. I don't recall, but probably there was.

Q. I see. What is your height, Doctor Hargrave?

A. Five foot six inches, with my shoes on.

Q. I see. All right, you all started then on the trip, is that right? A. Yes, sir.

Q. Who took the lead? A. Mr. Dillon.

Q. Was anything stated to you about his maintaining and keeping the lead, and you two to follow?

A. No, sir.

Q. Did he give you any kind of instructions, Mr. Dillon?

A. No, sir. We just presumed that he was going to lead off and we would follow.

Q. All right, sir, who was in the middle? [83]

A. Ann.

Q. And you were behind? A. Yes, sir.

Q. Did you have your camera with you?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir.

Q. What kind of camera?

A. Contax 35 MM camera.

Q. What kind of film did you have?

A. Kodachrome.

Q. Color film? A. Yes, sir.

Q. And you all proceeded on toward what was known as the Josephine Lake Trail? Is that right?

A. I do not know the name of the trail. It is just a trail.

Q. How wide is it?

A. Well, part of it is a road that comes up there. I do not know how far the road goes. It is a double road, it is not a good road, but it is standard gauge, automobile road, and then further on up it is my recollection that the road stops and then it is just a single trail.

Q. I see. Is it flanked on the sides by foliage or not? I don't mean all the way.

A. Yes, in places. There are trees going up, on each side of the road on the trail. [84]

Q. Approximately how far would you say it was from the hitching post to the lake?

A. About a mile or a little over, one and a quarter miles.

Q. Were you all going at a slow walking pace riding up there? A. Yes, sir.

Q. Did your horse maintain that pace or did he ever do anything?

A. Sometimes my horse would get a little behind

(Testimony of Dr. Robert L. Hargrave.)

the other horses. He never stopped going up to the lake at all except on one occasion.

Q. We will get to that in just a moment.

A. Sometimes I noticed my horse would go behind just a little bit and then he would catch up with the other horses by taking a slow trot, kind of a jog.

Q. What would you do when he would start trotting? Would you do anything with reference to the reins?

Mr. Blewett: I object to that as a leading question.

Mr. Kouri: I will withdraw it.

Mr. Blewett: I have permitted a lot of leading questions, but I have to object to some of them.

Mr. Kouri: I am sorry, your Honor, I will withdraw it.

Q. Then after the horse jogged, then what did you do, or trotted a little, what did you do? [85]

A. I just sat on the horse and let him jog, I stood up——

Mr. Blewett: Your Honor, one of the jurors called my attention that she did not hear me. Would you speak up.

The Court: Can you hear him?

A Juror: Yes, he is just a little further away.

The Court: You let me know if you don't hear at any time. You just raise your hand if you are not hearing and we will ask the witness to speak louder.

A Juror: Thank you, your Honor.

Q. (By Mr. Kouri): Doctor, did anything hap-

(Testimony of Dr. Robert L. Hargrave.)

pen going up, a little incident going toward the lake? A. Yes, sir.

Q. Please tell the jury in your own words what happened?

A. I dropped a roll of film out of my sweater pocket. It jiggled out and fell down on the ground.

Q. Then what happened?

A. And then I must have——

Q. Let me ask you this. Who was ahead of you at the time? A. Ann and Mr. Dillon.

Q. Your daughter Ann, what did she do then?

A. She turned around and got off her horse and picked up the film and gave it to me.

Q. Then did you all proceed then toward the lake? [86] A. Yes, sir.

Q. Did Mr. Dillon say anything to you after that incident or did he say anything at that time?

A. I don't recall.

Q. Then you proceeded on, did you not?

A. Yes, sir.

Q. And you got to the lake? A. Yes, sir.

Q. What did you do when you got to the lake?

A. I got off the horse.

Q. Did Mr. Dillon get off? A. Yes, sir.

Q. Did Ann get off?

A. I believe she stayed on her horse.

Q. Did you take some pictures? A. Yes.

Q. How many? A. Several pictures.

Q. Did you take any on the way going up?

A. No, sir.

Q. But you took several? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. How long were you all there?

A. About fifteen minutes.

Q. All right, then was Ann staying in the vicinity [87] with you and Mr. Dillon, or was she riding or what?

A. Well, I think she was riding, if I remember right. She was riding her horse around there.

Q. Did you and Mr. Dillon have a conversation?

A. Yes, sir.

Q. At the time? A. Yes, sir.

Q. Before you attempted to mount your horse again to come back? A. Yes, sir.

Q. What was the nature of your conversation?

A. We talked about the pictures and about the article in the National Geographic Magazine and about some young girls that had taken these pictures, some photographer, and he had been with her when she was taking these pictures, and he told me she had spent all summer up there taking pictures.

Q. Was that all.

A. Because I was interested in taking pictures.

A. Yes, all right.

A. That was our first conversation.

Q. That was the extent of it?

A. It might have been more. I remember that part of it.

Q. After the pictures were taken then what did you do? After the pictures were taken at the lake?

A. Well, I only took three or four pictures up at the [88] lake, and then they weren't too good because the clouds weren't right. It was not a bright

(Testimony of Dr. Robert L. Hargrave.)

day and they weren't too good pictures, so we came back then.

Q. Before you came back, tell us about your mounting your horse?

A. Well, I had a lot of trouble getting on the horse before we started back.

Q. What kind of place were you in with reference to the horse, low, high, medium or what?

A. Well, I was—it was just flat ground there as far as I am concerned, perfectly flat.

Q. Did you put your foot in the stirrup?

A. I put my foot in the stirrup and I grabbed the saddle horn and I couldn't get on for some reason, and the saddle pulled clear over to the left side of the horse; that is, with the horse's left side the way we consider our left, and the right, and then Mr. Dillon straightened the saddle up and tightened the belly belt of the saddle and then when we were ready I started to get on the second time and he told me to catch hold of the horse's mane and I did it and I pulled up on the horse; and I believe he helped me, boosted me up if I remember correctly.

Q. By "belly belt" you mean the cinch?

A. The band that goes around the bottom of the horse, that keeps the saddle on.

Q. Do you know anything about bits they use in these [89] riding stables? A. No, sir.

Q. Anything at all about them?

A. No, sir.

Q. You did not have a chance to observe this bit, did you? A. No, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now in the interest of saving time, you mounted then all of you. Describe to the Court and jury what happened as you came down the trail coming back?

A. We came back in the same position as we went down. Mr. Dillon was first, Ann was second, and I was in the tail or third. And we came down the trail, and when we came down the trail I took some pictures of Ann with my camera, three or four pictures of Ann. On that trail there was a lot of brush like there was going up.

Q. How long did the pictures take?

A. To take a picture?

Q. Yes? A. About a second or two.

Q. Did you stop any?

A. No, I did not stop then.

Q. I see.

A. I did not stop when I was taking the pictures of Ann or Mr. Dillon. [90]

Q. Doctor, I asked you earlier about the foliage there. State whether or not Mr. Dillon and Ann at times coming back would be out of sight of you, in view of the foliage in the upper and lower ground?

A. Yes, sir, they were. Mr. Dillon was I know.

Q. How far apart were you?

A. Well, it varied.

Q. Tell us about the variance.

A. Sometimes we were relatively close and it was a couple of horse lengths between, and sometimes further apart.

Q. Upon how many occasions did Mr. Dillon and

(Testimony of Dr. Robert L. Hargrave.)

Ann, or either one alone, how many times did the view become obscured to where you could not see them coming back, if you recall?

A. I do not know.

Mr. Kouri: Your Honor, it fits in now in the continuity of this testimony, we have some colored slides that were taken. He took the pictures. May we show them?

The Court: You may.

(At this time slide projection equipment was set up in the court room.)

Mr. Blewett: Mr. Kouri, may I ask if these have to do with the horses?

Mr. Kouri: It is relevant to the trip. They were taking a trip.

Mr. Blewett: I just would like to know what they are pictures of. [91]

The Court: They were all taken on this trip, were they?

Mr. Kouri: Yes, with the exception of one which we are not going to show.

A. Well, these pictures, your Honor, are in series that are taken with two rolls of film, and they are in direct series, and they are all the pictures that were taken on that trip. On each end there is a picture that was taken, the picture that was taken immediately preceding the trip and the picture that was taken immediately after the trip.

The Court: I understand those will not be shown.

Mr. Blewett: What I was wondering, your

(Testimony of Dr. Robert L. Hargrave.)

Honor, if they are just pictures of scenery, we admitted in our pleadings they were up there.

The Court: It seems to me that the pictures should be limited to the trail.

Mr. Kouri: We will not offer this. It was taken immediately before. So if you will pull that and put the next one in. (Mr. Bretz operating slide projector.)

A. These are all the pictures I took. That is not the trail.

Q. Just a minute until we get the thing focused.

A. That is not the trail. Take that out.

Q. Now, Doctor Hargrave, we have the screen up and projected with what we will call Plaintiff's Exhibit #5. Please [92] describe that picture, will you?

A. That is a picture of Josephine Lake with my daughter on her horse, and that is Mr. Dillon's horse, the white horse.

Q. On the right? A. Yes, sir.

Q. Did you take this picture? A. Yes, sir.

Q. And does this picture here represent the true condition as existing at the time you took it, of the area and the horses? A. Yes, sir.

Mr. Kouri: Of course we will want to offer that in evidence.

(At this time Plaintiff's Exhibit #5, being a kodachrome transparency, was marked for identification.)

Q. Go ahead.

(Testimony of Dr. Robert L. Hargrave.)

A. If the screen were brought closer up I think it would make better pictures.

Q. Now we have on the screen Plaintiff's Exhibit #6, a colored picture. Did you take that picture?

A. Yes, sir.

Q. On this particular trip, on June 23rd?

A. Yes, sir.

Q. Who is that mounted on the horse there?

A. That is Ann, my daughter. [93]

Q. And where are you approximately in feet behind Ann? How many feet, if you recall?

A. I would say about twenty feet.

Q. I notice there, Doctor, there is a bend here in the trail?

A. Yes, sir.

Q. What kind—how much of an angle does that make there? Is it slight or not?

A. I can't tell any more than what the picture shows.

Q. Where is Blacky there?

A. He is in front.

Q. Do you know approximately how far ahead he was?

A. He was around the curve. I do not know how far.

Q. Now does that picture truly represent the conditions as they existed then in that area along the trail, and the foliage there and everything?

A. Yes, sir.

Mr. Kouri: We will offer that in evidence.

Mr. Blewett: Mr. Bretz, can you brighten that

(Testimony of Dr. Robert L. Hargrave.)

up in any way? The detail isn't as good as it should be.

A. If you could get the screen closer it would be better.

Mr. Blewett: Mr. Kouri, may I ask him a question?

Mr. Kouri: Yes.

Mr. Blewett: Are these on the way up?

A. No, sir, they are on the way back. I made no pictures going up. [94]

The Court: How far was this from the lake, do you recall, Doctor, Plaintiff's Exhibit #6?

A. I don't recall, but I think it was probably a fourth mile from the lake. It could be farther.

Q. (By Mr. Kouri): We show now Plaintiff's Exhibit #7. Doctor, did you take that picture on the occasion in question? A. Yes, sir.

Q. And who is on the mount there, on that horse in the picture?

A. Well, Ann is on the horse on the right and Mr. Dillon is on the horse on the left.

Q. From the way the light is coming down which is more pronounced there insofar as the view is concerned of Mr. Dillon or Ann?

A. Which one can you see the better?

Q. Yes? A. On the picture?

Q. Yes? A. You can see Ann better.

Q. What kind of jacket or coat did Mr. Dillon have on, if you recall?

A. I wouldn't know only what the picture shows. I wouldn't have any recollection what he has on.

(Testimony of Dr. Robert L. Hargrave.)

Q. He has a hat on there, does he not? [95]

A. Yes, sir.

Q. Does that picture truly represent the conditions as they then existed on that date, this picture here? Does that represent what you took?

A. Yes, sir.

Mr. Kouri: All right, we offer that in evidence.

The Court: Where was that taken, Doctor, with reference to Exhibit #6?

A. That was taken next, they are in sequence coming back.

The Court: When you took this picture how far were you from when you took Exhibit #6, the preceding picture? A. I do not know.

Mr. Blewett: Did you offer that in evidence?

Mr. Kouri: I offered it. I will offer them altogether, individually.

The Court: Perhaps we had better go back.

Mr. Kouri: This will be #7.

The Court: You have offered #5, #6 and #7. You are offering #5, #6 and #7 at this time I understand. Any objection?

Mr. Blewett: I have no objection.

The Court: Plaintiff's Exhibits #5, #6 and #7, are received.

(Whereupon Plaintiff's Exhibits #5, #6 and #7, being kodachrome transparencies, were admitted into evidence.) [96]

Q. (By Mr. Kouri): Now, Doctor Hargrave, I show you Plaintiff's Exhibit #8. Now was that taken by you on this occasion? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. And were you on your horse?

A. Yes, sir.

Q. Like you were on all the rest of them?

A. Yes, I was on horse on all of them.

Q. How far away from the lake was this taken, if you recall?

A. I do not know, but it was further down the trail.

Q. Down the trail? A. Yes.

Q. But insofar as Exhibits #5, #6, #7 and #8, they were taken in sequence, in time sequence?

A. In that order, yes. There are no films that were taken that aren't shown.

Q. I see. Did you have one that did not develop? Did you have one out of the bunch?

A. There is one we did not show because it was the last one.

Q. Is that this one (handing film to witness)?

A. Yes, sir.

Q. Can you make out anything of that at all?

A. Yes, that is a picture of Ann on a horse up at the lake. [97]

Q. Can it be shown here without the cover on it? Can it be put in that?

A. I think you might be able to. It is the last one before this series on the trail.

Q. All right, fine. Now that shows just a portion of Blacky's horse and the major portion of his body on top of the horse, isn't that right?

A. Yes, sir.

Q. And Ann there behind him? A. Yes.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now how far do you think you were behind him then?

A. I think about twenty feet, maybe a little bit further. Maybe twenty-five feet, not very far though.

Q. Now in view of Exhibits #5, #6, #7 and #8, how many, if you recall, how many were taken at turns that you took?

Mr. Blewett: Your Honor, I think the pictures are self explanatory on that.

The Court: I think it should be limited to each picture as you come to it.

Q. This is another taken there at a turn in the trail?

A. I can only say what the picture shows. I have no recollection of that.

Q. Does that look straight? A. No, sir.

Q. All right, thank you. And that represents the true [98] condition that existed at the time you took it? A. Yes, sir.

Mr. Kouri: I believe that is all on that one. We will offer it.

The Court: Any objection?

Mr. Blewett: No objection.

The Court: Plaintiff's Exhibit #8 is received.

(Whereupon Plaintiff's Exhibit #8, being a kodachrome transparency was admitted into evidence.)

Q. (By Mr. Kouri): Now, Doctor, there is Plaintiff's Exhibit #9. Was that taken after Exhibit #8?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, sir, if they are in sequence—if they are marked in series on them.

Q. This is on the trail coming on back, is that right? A. Yes, sir.

Q. Who is in front? A. Mr. Dillon.

Q. And behind? A. Ann.

Q. Is that the way you all stayed up to this time riding? A. Yes, sir.

Q. And that represents the true condition existing at the time? A. Yes, sir. [99]

Mr. Kouri: We offer that in evidence.

Mr. Blewett: No objection.

The Court: Plaintiff's Exhibit #9 is received.

Q. Now, Doctor, I show you Plaintiff's Exhibit #10. What is that?

A. That is a picture of Swift Current Lake with Mount Wilbur in the background.

Q. Well, we don't offer that. You have two series of film there?

A. That is the next one. I made that from the trail. That is the last picture I took.

Q. Is that the last one you took?

A. That is the last one I took.

Q. Does that represent the true condition as it existed there? A. Yes, sir.

Mr. Kouri: That is #10. We will offer that.

The Court: Where was that taken in relation to the others?

A. It was taken in sequence. It was further down the trail.

The Court: You do not know how much further?

(Testimony of Dr. Robert L. Hargrave.)

A. No, I don't, I do not know, but probably not too far though.

Mr. Blewett: I would like to ask a question on that one. [100]

Voir Dire

Q. (By Mr. Blewett): This is a picture of Swift Current Lake, Doctor? A. Yes, sir.

Q. Is that near the Many Glacier Hotel, or where is it?

A. Yes, sir, it is a long lake.

Q. Is this about where you started out from on the trip to begin with?

A. No, that is coming back.

Q. This is on the way back as you approached the hitching post?

A. There is a clearing there and I took that picture, that is the last picture I took.

Q. This picture then is the last picture you took and it is as you approach the hotel, the Many Glacier Hotel, and the riding post, from where you started, is that it?

A. That is the last picture I took on the way back to the hotel, is that what you mean?

Q. Where in relation to Many Glacier Hotel is this picture taken?

A. Probably one half mile from the Hotel.

Mr. Blewett: I have no objection to its admission.

The Court: Plaintiff's Exhibit #10 is received.

(Testimony of Dr. Robert L. Hargrave.)

(Whereupon Plaintiff's Exhibit #10, being a kodachrome transparency, was admitted into evidence.) [101]

Q. (By Mr. Kouri): Incidentally, Doctor, is there any other transportation that you can go from the hitching post up to this lake other than by this trail and these horses?

A. Yes, sir, you could walk up there, or there is a motor boat that runs up there.

Q. A motor boat? A. Yes, sir.

Q. Is that the only two means, horses and motor boat? A. Yes, sir, or walking.

Q. All right, we are now showing you Plaintiff's Exhibit #11. A. That is of the Hotel.

Q. And when did you take this?

A. I took it that same afternoon that I got back. I think I did. It is possible I might have taken it the next morning, but I believe it was that afternoon.

Q. Does that represent the true condition as you saw it at the time? A. Yes, sir.

Mr. Kouri: All right, we offer it.

Mr. Blewett: I have no objection.

The Court: Plaintiff's Exhibit #11 is received without objection.

(Whereupon Plaintiff's Exhibit #11, being a kodachrome transparency, was admitted into evidence.) [102]

Q. There is one more, the broken one. This one here, what did you say happened to it? It will be Plaintiff's Exhibit #12?

(Testimony of Dr. Robert L. Hargrave.)

A. Well, that film is the last one and I did not have enough film to make a picture, so it—no doubt the company does not mount those unless they are good pictures.

Q. Now there is Plaintiff's Exhibit #12. That is Ann on her horse? A. Yes, sir.

Q. And was that taken going up or coming back, or where at? A. At the lake.

Q. That is where you were taking pictures up there too? A. Yes.

Q. When you had that conversation with Mr. Dillon about the magazine article?

A. Yes, sir, that picture was made, the sequence of this is it should be about second in this row instead of last.

Q. Those you were taking then coming back?

A. No, sir, that was made at the lake.

Q. And the others coming back, is that right?

A. This was made at the lake and those others made at the lake, Ann on the horse and Mr. Dillon's horse grazing, made at the same place this one was made.

Q. And the others obviously show the trail coming back? [103]

A. The others were all coming back. I made no pictures going up.

Mr. Kouri: We offer this in evidence.

The Court: Plaintiff's Exhibit #12. Is there any objection.

Mr. Blewett: There is no objection.

(Testimony of Dr. Robert L. Hargrave.)

The Court: Plaintiff's Exhibit #12 is received without objection.

(Whereupon Plaintiff's Exhibit #12, being a kodachrome transparency, was admitted into evidence.)

The Court: That is all the pictures?

Mr. Kouri: That is all the pictures, yes, your Honor.

Q. All right, Doctor, we have seen these pictures and they have been shown to the Court and jury, all the pictures you took coming back from the lake. Now did anything unusual then happen after this time on the trip back?

Mr. Blewett: Your Honor, I object to that as a leading question.

Mr. Kouri: I will withdraw the question.

The Court: The question is withdrawn.

Q. Did you continue to proceed along coming back to the hitching post, Blacky, Ann and you?

A. Yes, sir.

Q. In the same way? At the same pace?

A. Well, not all the way, no. [104]

Q. All right, then please tell us in your own words and relate from there on further please, Doctor.

A. Well, after I made that last picture, I do not know just how long it was, Ann and Mr. Dillon were a little further up in front, and we went through some more brush and my horse was walking slowly, and then when my horse came in the clear all at once he just started to run just as fast

(Testimony of Dr. Robert L. Hargrave.)

as he could. And at that time Ann and Mr. Dillon were about one hundred yards up in front running their horses. It might be seventy-five yards, but it seems like it was a longer ways. They were pretty far off. They were running their horses, and my horse just from a walk he took off and ran, just right off.

Q. What happened to you?

A. Well, when the horse ran, he threw me back in the saddle and bumped me up in the air, and he kept running and you couldn't stop the horse. I pulled on the reins and you couldn't stop the horse at all, and I pulled as hard as I could, and I was off balance on the horse and the horse was running at full speed, and threw me up and down on the horse and just beat me to death.

Q. Did you feel anything in your body?

A. Yes.

Q. What?

A. After the horse took two or three paces it seems to me like, I do not know how many, but it seems to me like [105] it was right after the horses started to run I felt two places pop in my back, one low down and one up higher in the lower part of your thorax in the spine.

Q. Now please go on from there. You saw them seventy-five to a hundred yards ahead?

A. Yes, sir. Then I hollered and tried to stop the horse and the horse wouldn't stop. And I could see ahead and Mr. Dillon and Ann, they stopped their horses and turned around and by then my horse was

(Testimony of Dr. Robert L. Hargrave.)

pretty close to them and he stopped or slowed down.

Q. All right, when you felt those two pops how did you feel?

A. Well, I just felt it pop, that is all. It hurt.

Q. All right. Then what did Mr. Dillon do when you stopped down there? Had he turned around?

A. Well, I think he did.

Mr. Blewett: I will object as leading.

The Court: Objection sustained.

Mr. Kouri: I will withdraw it.

Q. Then what happened?

A. Well, after I was running down on the horse, and the horse almost—I thought he was going to throw me off the horse and I was trying to stop him. Then when we came up on Mr. Dillon and Ann, who had turned around, then Mr. Dillon turned around and said “now what happened.” [106]

Q. Was he on or off?

A. Was he on or off the horse?

Q. Yes, sir? A. I do not know.

Q. How did you feel?

A. When I said that, I do not know, he was on or off the horse?

Q. How did you feel?

A. I did not feel very good. I told Mr. Dillon that I hurt my back on the horse.

Q. What did he say?

A. (Cont.) And that I wanted to get off and walk to the Hotel, and I tried to get off the horse and I couldn't get off the horse.

Q. Why?

(Testimony of Dr. Robert L. Hargrave.)

A. I just couldn't do it. It was hurting, and I just couldn't get off the horse.

Q. All right, then what happened?

A. Then I told Mr. Dillon I would go on to the Hotel on the horse. Then we proceeded slowly to the Hotel.

Q. In what order, if you remember?

A. In the same order that we had been.

Q. Did he do anything now before you all started back to the hotel? Did he do anything with reference to you or your horse or saddle? [107]

A. Not that I recall.

Q. Did you notice your saddle?

A. No, sir, I don't recall. I do not know. I was hurting bad, and I just don't know what went on, except we went back to the Hotel slowly, and I got feeling better, by the time we got back to the Hotel I could get off the horse.

Q. What were you doing just before your horse started to make this run?

A. I was just sitting on the horse holding the bridle.

Q. Which way were you looking?

A. I do not know. I might have been looking off. I just don't know.

Q. Could you see Ann and Mr. Dillon immediately before your horse started running?

A. It is possible just a split second before I could see him running. It was just a split second before. I do not know.

Q. Then your horse started in?

(Testimony of Dr. Robert L. Hargrave.)

A. My horse started right off immediately.

Q. When you got down to the hitching post what happened?

A. Well, I got off the horse.

Q. Did anyone help you?

A. I do not know whether anyone helped me or not.

Q. But what did Ann do?

A. She got off her horse. [108]

The Court: I think this might be a good place to suspend. Court will be in recess fifteen minutes, and the jury will keep in mind the admonition I have heretofore given.

(2:45 p.m.)

(Whereupon at 3:00 p.m., the court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

The Court: You may proceed.

(Dr. Hargrave was recalled to the stand.)

Further Direct Examination

Q. (By Mr. Kouri): I believe just prior to the recess, Dr. Hargrave, we were up to the time you all came back to the hitching post and you said Ann got off?

A. Yes, sir.

Q. Incidentally, what kind of wearing apparel did Ann have?

A. I do not know except what shows in that picture, and I don't remember.

Q. All right, Doctor, now in your own words

(Testimony of Dr. Robert L. Hargrave.)

please relate to the Court and jury what happened next?

A. Well, after I got off of the horse then I paid Mr. Dillon for the ride up there. I asked Mr. Dillon how much it was and he told me it was four dollars, and to me that was a very reasonable amount. But I did not have the change, and I gave Mr. Dillon a larger bill, I do not know what it was, [109] and he went down to the Hotel and got change and brought it back. And after he gave me the change then Ann and I went over to the automobile, or it is possible that Ann went down to the hotel to look her mother up. Anyway, I went back to the car and Mrs. Hargrave joined us there. She was either at the car or joined us there, I don't remember which. And I told her I got my back hurt, and at that time we found a note on our car from these neighbors in Wichita Falls, stating they were staying at Swift Current Camp Grounds and to look them up. So we got in the automobile and drove over to Swift Current Camp Ground and talked to these friends a little bit. By that time, my back was hurting me, and we decided we would stay there that night. We had originally planned to drive on home down the road. But we went to a motel at the tourist court, a nice motel there at Swift Current Lake and stayed that night there. Now then while at the Camp Ground, prior to that Mrs. Ryan had told us about a lecture about the park that was going to take place that night at the Hotel, but after we got to the motel I went to bed because my back was hurting, and I

(Testimony of Dr. Robert L. Hargrave.)

went to bed. And Mrs. Ryan, not hearing from us whether we were going to go to the lecture or not, came up to the motel to our room later on that day and she saw me there in the room and I told her my back was hurting and that I just couldn't take the trip, couldn't go down to the lecture. So Mrs. Hargrave, I think she went to the lecture. I am not sure. But [110] that is the last that we saw of the Ryans. And the next morning rather late we started back home by automobile, and it took us six days to drive back home because I would feel pretty good sometimes and at other times my back would hurt a lot, and I had to stop early. So it is about eighteen hundred miles back home and it took us six days. We averaged about three hundred miles a day coming back, and I know coming back I had a lot of trouble with my back. My wife had to put pillows behind me and put her arm behind my back to hold me up. And while we were at Denver I stopped at a lumber yard and bought a piece of 1 x 12 about 2 feet long to put behind my back so that I could sit back, and that helped me a lot by doing that. And then after we got back home, which was on I think it was on a Sunday, my back continued to hurt, and the next day, Monday, I had some X-ray pictures made of my back.

Q. Where?

A. I had them made at the Bethania Hospital, and they showed some trouble with my back. And for the next two weeks I really did have trouble. I was practically one hundred per cent disabled for

(Testimony of Dr. Robert L. Hargrave.)

the two weeks after I got back home. This thing got worse after I got back home. And I might have made one or two calls or gone to the office two or three times, but otherwise I was home trying to get relief. I had gone to Dr. Maxfield and he gave me some pills to take, and I took them and they made me sick so I quit taking them. For about [111] two weeks I spent most of my time either on a hard bed or on the floor. And I know at one time I remember it was so bad, it was really bad there for a few days. Then the pain got better and I was able to go back to work and to do my work, part of my work anyway, and I got better over a period of about six months. And since then it has been about the same. But after the first X-rays were made that showed this trouble in my back, about a month after that I had another X-ray made of my back and to me it showed an increase in this trouble in my back.

Q. What part?

A. In the lower dorsal spine.

Q. What vertebrae number?

A. The 10th dorsal vertebrae.

Q. Where were these made? You said a month later?

A. They were made at the Bethania Hospital.

Q. Go ahead?

A. Then I was dissatisfied with the treatment I was having and I was worried about the increase, the apparent increase to me, in this vertebrae which was collapsed on the front part of it, which to me had increased in that month. It looked to me like

(Testimony of Dr. Robert L. Hargrave.)

the X-rays, that the condition had progressed, and I was not satisfied with the Doctors that I was going to, and I went to New Orleans and consulted Dr. Wickstrom at Tulane University. And Dr. Wickstrom sent me to Teoro [112] Infirmary. That is a large hospital at New Orleans. He had X-rays made of my spine and my head and my chest.

Q. Excuse me, Doctor, just a moment. Dr. Wickstrom, had you known him before?

A. No, sir.

Q. What does he specialize in?

A. Dr. Wickstrom is an orthopedic surgeon. He is Professor of orthopedic surgery at Tulane University. And the reason I went to him, my son who is now in the Navy was a medical student then, he was a senior medical student, and was working part time in the laboratory under Dr. Wickstrom.

Q. Dr. Wickstrom is an orthopedic surgeon and professor of orthopedic surgery at Tulane?

A. Yes.

Q. He X-rayed you?

A. Yes. He told me I had a compression——

Mr. Blewett: I object to that as hearsay evidence.

The Court: Sustained.

Q. Dr., let's put it this way. Did you see the X-rays that were made of your spine?

A. Yes, sir.

Q. Did you observe anything on it? What did you observe about it, from a medical standpoint?

A. I observed what I had on the other X-rays.

(Testimony of Dr. Robert L. Hargrave.)

Q. What did you see? [113]

A. There was a compression fracture of the 10th thoracic vertebrae.

Q. Did you see it?

A. Yes, the X-ray picture showed it.

Q. How many pictures revealed that?

A. Oh, there were many pictures that revealed that.

Q. You have them here in your possession, all the X-rays that were ever made of your back, do you not?

A. Yes, sir.

Mr. Kouri: Later we will offer them in evidence, your Honor.

Q. All right, go ahead, Doctor. We were talking about the X-rays Wickstrom made?

A. Yes, sir. So Dr. Wickstrom prescribed treatment.

Mr. Blewett: Your Honor, I think from this point on I just about have to have the attorney ask him questions because it is hard for me to foresee what he might say, and I think he has gotten pretty well along on his own, and from this point I would prefer it be in question and answer style.

The Court: Very well.

Mr. Kouri: Very well.

Q. Were you given prescribed treatment by anyone down there at New Orleans?

A. Yes, sir.

Q. By whom? [114]

A. Dr. Dickstrom.

Q. Did you follow that prescription, carry it out and use it?

A. Yes, sir.

Q. Did it help you in any way?

(Testimony of Dr. Robert L. Hargrave.)

A. Yes, it helped some.

Q. And what was it please?

A. He told me to lose weight and to take exercises, prescribed exercises for me.

Q. Did you take them? A. Yes, sir.

Q. What was the nature of the exercises?

A. They were just usual exercises and various types of calisthenic exercises.

Q. And how long a period did you do that?

A. I did that one or two or three weeks.

Q. Did you notice any difference in your feeling?

A. I felt better when I was doing the exercises.

Q. How often would you do them a day, or a week?

A. I did them every day.

Q. In the mornings or afternoons or evenings?

A. Well, I think I did them both times, both mornings and evenings both.

Q. Did you see anyone else down there at New Orleans besides Dr. Wickstrom? [115]

A. Not at that time.

Q. All right, what happened then?

A. Well, I went back for another check up. Dr. Wickstrom told me to come back later on. In about two months I went back again.

Q. Tell us what happened?

A. At that time I had more X-rays made.

Q. How many more?

A. Well, several more.

Q. Of what part of your body?

A. Of the spine, thoracic and dorsal and lumbar

(Testimony of Dr. Robert L. Hargrave.)

spine. There at that time Dr. Ane made the pictures.

Q. Who is he? Give me his background professionally.

A. Dr. Ane was a classmate of mine, and I knew Dr. Ane.

Q. What does he specialize in?

A. He specializes in radiology.

Q. Do you have his X-rays here?

A. Yes, sir.

Q. We have Wickstrom's here?

A. Yes. The ones at Teoro were there.

Q. And we have Ane's there?

A. Yes. I went to Dr. Ane instead of going to Teoro because Dr. Ane's office is downtown and Teoro Infirmary, where the first X-rays were made, is a considerable distance from town. Knowing Dr. Ane, I naturally went to Dr. Ane for the other pictures. [116]

Q. I see. Did you see those X-rays?

A. Yes, sir.

Q. What did they reveal?

A. They revealed a compression fracture of the 10th thoracic vertebrae.

Q. Anything else?

A. There were some spurs around on my back, on the spine.

Q. Had you been X-rayed insofar as your back was concerned back years prior to this time?

A. Yes, sir. I had X-rays of my back made at the Mayo Clinic in 1950.

(Testimony of Dr. Robert L. Hargrave.)

Q. What was the purpose of it?

A. The purpose was to see if I had any trouble with my back because I had had some low back pain.

Q. And who took those X-rays, if you recall, at Mayo Clinic? A. I don't know.

Q. Under what Doctor's supervision?

A. I wouldn't know. Dr. Stroeble is the Doctor, I registered in his section.

Q. Stroeble?

A. Yes. I never knew him before.

Q. Did you then get in touch with them over the last two weeks or so to get a report that was made back in 1950? [117] A. Yes, sir.

Q. You did that at whose request? Who asked you if you would do that?

Mr. Blewett: We object to that as incompetent, irrelevant and immaterial at this time. The Doctor is a Doctor. We haven't raised any question as to his qualifications. We have authorized him to testify to the X-rays and I do not have any idea what counsel for the plaintiff is trying to prove in connection with the report from Mayo Clinic. I would like the argument to be out of the presence of the jury.

(At this time counsel approached the bench and there was argument held outside the presence and hearing of the jury.)

Q. (By Mr. Kouri): Doctor, did you obtain the report from Mayo? A. Yes, sir.

Q. And your Attorney has it? A. Yes, sir.

Q. And copies? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now how long were you down there this second trip to New Orleans when you saw Dr. Ane?

A. How long was I down there?

Q. Yes, sir? A. Oh, a day or two.

Q. Then you came on back home? [118]

A. Dr. Ane only made the X-ray pictures. I saw Dr. Wickstrom again.

Q. Did he make any other pictures?

A. Not Dr. Wickstrom. Dr. Ane made the pictures.

Q. Did you take those pictures, Dr. Ane made to Dr. Wickstrom?

A. No, I think Dr. Ane sent them over.

Q. He saw them?

A. Yes, Dr. Wickstrom examined the pictures.

Q. And you did too? A. Yes, sir.

Q. You came back home after that then?

A. Yes, sir.

Q. Please describe how you were feeling at that time when you got home?

A. Well, I can't recall that, but I was improving up until about six or eight months after. I mean there was gradual improvement in the condition from about two weeks after I got back home from the Park, the condition gradually improved for about six or eight months, and since then it has been about the same, my symptoms.

Q. Before June 23rd, what were your office hours?

A. Well, I don't have any regular office hours.

Q. Were you doing a lot of surgery?

(Testimony of Dr. Robert L. Hargrave.)

A. Quite a bit, yes. [119]

Q. Were you a member of the staff of all the hospitals there? A. Yes, sir.

Q. Were you pretty busy before the 23rd in your practice as a physician and surgeon, keeping pretty busy?

A. I would say so. Of course, business is up and down. Sometimes you don't have much, sometimes you have a lot.

Q. What difference have you noticed since June 23, 1956, in the way you get around and your practice, including your operations and everything? Please tell us.

A. I don't get around as well, I fatigue in the afternoon and I have to go to bed early, and I can't take any emergency service at the hospital. In other words, I just have to do about three fourths of a days work.

Q. How long has that been going on?

A. That has been going on for the last eighteen months. And if I lift anything, or do much stooping or lifting, why I might have trouble that night or several nights after I will have a lot of trouble with my back.

Q. Do you do as much surgery now as before the injury? A. I don't think so, no.

Q. How does it affect you when you are performing a surgical operation?

A. If my back hurts, it just hurts. I have to walk around and straighten up. I have never had an operation where [120] I had to quit the opera-

(Testimony of Dr. Robert L. Hargrave.)

tion, but it slows you if it is uncomfortable, and it hurts.

Q. Did you after Dr. Ane's X-rays seek the services of another orthopedic surgeon?

A. Well, after that I went back to see Dr. Wickstrom for a third time, and I believe for a fourth time.

Q. Yes, sir. Over what period of time?

A. About three months apart.

Q. All right. A. Three or four months.

Q. Were any more X-rays taken?

A. Yes, sir, X-rays were made every time I went back. Perhaps not the last time.

Q. What did they show from your observation?

A. They showed the same condition that was present before.

Q. Did it show anything between thoracic vertebrae #10 and #11, the space there?

A. It showed some narrowing of the space, and there were spurs on the front of the vertebrae.

Q. What was the width of the 10th vertebrae in millimeters? From the radiologist's report?

Mr. Blewett: Just a minute, Dr. Hargrave.

Mr Kouri: We will strike that and introduce it at another time. [121]

Q. All right, Doctor, then you went back a fourth time. Then who did you see?

A. Well, one time I went back, the last time I went back was in August of '58, and I went back to see Dr. Wickstrom, but I did not see Dr. Wickstrom because he had had his knee operated on and

(Testimony of Dr. Robert L. Hargrave.)

he was in the hospital, and I saw some young Doctor there. I have forgotten his name. But then I went over to see Dr. Semone who is professor of orthopedic surgery at Louisiana State University, whom I had known since I was in medical school, Dr. H. T. Semone. That is pronounced Semo. So Dr. Semone looked at the X-ray pictures and he prescribed an arch support for the left foot I think. He thought that that might be contributory possibly to the trouble I was having.

Q. Have you been having any trouble with your feet, any one of your limbs?

A. Yes, but not in relation to this arch support.

Q. I am not talking about that. Have any of your limbs bothered you since the injury?

A. Yes, sir. Since I have been hurt I have had from time to time, most of the time, I have had a burning pain in the bottom of my left foot. Sometimes it will get all right and other times it is present.

Q. How is the condition in your low back?

A. The low back doesn't bother me.

Q. What is your main complaint now? [122]

A. My main complaint is now if I lift or stoop, or even of a morning when I am shaving and bend over forward, I get pain in the back, in the region of the fracture, and if I lift anything or stoop much or do much lifting the pain is apt to be severe and it radiates right around in front of my chest. And, of course, that disables one. You don't feel good when it does that. Then perhaps that night I will

(Testimony of Dr. Robert L. Hargrave.)

have a lot of trouble sleeping. I will have a lot of trouble sleeping. I will be uncomfortable, and that might continue for several days, and then gradually get better. And about the time I think I am going to get well it will recur again and I have the same thing over again.

Q. All right, after having seen Dr. Semone, you came back, and did you see any other orthopedic surgeon?

A. Yes, sir, I saw Dr. Van Deventer.

Q. Dr. Loyd Van Deventer? A. Yes, sir.

Q. Where is he?

A. In Wichita Falls. I talked to Dr. Van Deventer before about my back, but he had never examined it. I thought I would like to have what he thought about it.

Q. Go ahead and tell us now?

A. He examined me and looked at the X-ray films and told me——

Mr. Blewett: Wait a minute. On what he told you [123] it is my understanding that the deposition of Dr. Van Deventer is here, which was taken, and whatever the Doctor has to say may be admitted to that extent.

The Court: I think the objection is well taken. Objection sustained.

Q. (By Mr. Kouri): And did he take X-rays of you, Dr. Van Deventer? A. Yes, sir.

Q. Of what part of your body?

A. He took X-rays of my thoracic and lumbar spine.

(Testimony of Dr. Robert L. Hargrave.)

Q. Did he look at all the other X-rays that were taken of your body? A. Yes, sir.

Q. And did he examine them, look at them on a shadow box? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. On how many occasions? A. Twice.

Q. And did you view and see his X-rays that were made? A. Yes, sir.

Q. What did they reveal, keeping in mind that was about over two years ago?

A. They revealed a compression fracture of the 10th thoracic vertebrae. [124]

Q. You saw it? A. Yes, sir.

Q. In his presence? I mean you saw Van Deventer's X-rays?

A. The X-rays he took showed the same thing that the other film showed.

Q. All right, Doctor, you were present when Dr. Van Deventer's testimony was taken in the way of a desposition, were you not? A. Yes, sir.

Q. When was that?

A. About two or three weeks ago.

Q. About the 5th of January?

A. Yes, sir, about then.

Q. And your deposition was taken?

A. Yes, sir.

Q. And Ann's desposition was taken?

A. Yes, sir.

Q. And Mrs. Ryan's, the neighbor's deposition was taken? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. You were present when all those were taken?

A. Yes, sir.

Q. As a party plaintiff, which you had a right to be?

A. Yes.

Q. How did you come up here from Texas?]125]

A. On this trial?

Q. Yes?

A. I came on the train. I came by Minneapolis.

Q. Did you stop at Minneapolis?

A. Stayed over night at Minneapolis, stayed at the Curtis Hotel.

Q. Is that where Mrs. Hargrave's mother lives?

A. She lives there, but we did not see her mother.

Q. She is quite old?

A. She is 81 I think.

Q. How do you feel, and how have you felt in the past week or so?

A. Well, I feel pretty good up here when I don't have anything to do.

Q. Prior to the time of coming up here, and your practice of medicine and surgery how were you feeling say about three weeks ago?

A. Well, at one time before I came up here I had a lot of trouble. I was going through some X-rays and trying to find some X-ray pictures that could possibly have been made in the past. I went through a lot of X-rays. I had to lift them up, and that caused me a lot of trouble then for several days.

Q. How old are you, Doctor?

(Testimony of Dr. Robert L. Hargrave.)

A. Fifty-four. [126]

Q. Since 1950 at Mayo Clinic up until the time of this injury, June 23rd, had you had any X-rays made of your back anywhere?

A. No, sir, I had no X-rays made of any kind.

Q. Had you had any complaints of any kind in your back?

A. No, sir, at that time I was doing good. Shortly after I had those made at the Mayo Clinic I got better and I did not have any more trouble.

Q. You were able to carry on your practice?

A. Oh, yes.

Q. Let me ask you this. During World War Two were you in the service? A. Yes, sir.

What branch? A. I was in the Army.

Q. What was your rank?

A. I was a Major and later on a Lieutenant Colonel.

Q. What did you do with reference to your duties while in the Army Medical Corps?

A. Well, I had various duties.

Q. Let's take them up step by step. First what general hospital were you in?

A. First I was sent to Billings General Hospital at Indianapolis, Indiana, and I did not like it there because I had a general assignment, and I got transferred to the Air Force and I was sent to New Mexico and I was there about a year. [127]

Q. Doing what?

A. Doing surgery at Rochell, New Mexico, at a small station hospital.

(Testimony of Dr. Robert L. Hargrave.)

Q. Where then did you go?

A. They transferred me to Tuskalooosa, Alabama, to the hospital there, and I stayed there for the rest of the war.

Q. Doing what?

A. Doing surgery, all kinds of surgery. I did hand surgery and general surgery and neuro surgery.

Q. Continually over what period of time?

A. Well, I did that about two years. They kept me in the army a year after the war was over.

Q. Why?

A. Because they said I was essential, they needed me. I had to do this reconstruction surgery.

Q. Then you were out of civilian practice about how long?

A. I was out of civilian practice a little over four years.

Q. Then when did you get mustered out, in nineteen forty what?

A. It was sometime in June of 1946.

Q. Then you were with the rank of Lt. Colonel?

A. Yes, I had been a Lt. Colonel eighteen months before I got out. [128]

Q. Then you came on back to your home?

A. No, after that I was Chief of Surgery at the Veterans Administration Hospital at New Orleans, with the best grade they had at that time.

Q. How long did you stay there?

A. Just a little while. Then I did not like that and I resigned and came back home.

(Testimony of Dr. Robert L. Hargrave.)

Q. And re-opened your office? A. Yes, sir.

Q. You are in the Hamilton Building there at Wichita Falls? A. Yes, sir.

Q. Have you had an occasion to check the number of operations that you have done at the Bethania Hospital there in Wichita Falls in the several past years? A. I did check it.

Q. Did Mr. Blewett ask you about that on the deposition?

A. Yes, I checked them after he asked me.

Q. And they checked the records and you checked the records?

A. I had the record librarian furnish me with the number of patients I had admitted to the hospital and the number of operations I did. That is what I requested.

Q. From the permanent records? The librarian got that from the records? [129]

A. I mean the record room looked for that.

Q. For how many years back?

A. Since 1950 I believe.

Q. 1950 clear up to when? 1957?

A. Yes, sir, up until——

Q. Or '58? A. To the present time.

Q. Up to the present time? A. Yes, sir.

Q. You are willing to give those figures to Mr. Blewett, showing the admissions, the number of patients if he so desires? A. Yes, sir.

Q. He asked you too to produce your income tax records? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. You did produce them to him at the deposition?
A. Yes, sir.

Q. Dr. please tell the Court and jury whether your income has been enhanced, about the same or increased proportionately to the type of practice that has been in existence in medicine and surgery since this injury of yours?

A. Well, my gross income was less for the year that got injured, in 1956, and I believe it was about the same as it had been in 1957; and in 1958 my gross income is more than it was before. The fact is, it is greater than it has ever been. [130]

Q. Well, was that still in view of the curtailment of your practice?
A. Yes, sir.

Q. In other words, basing your active surgery and practice on the years before the injury, was your income of 1958 in line with the way things were going?

A. Well, of course, that was a good year. I could have done more than that I think.

Q. How much more?

A. Probably twenty-five per cent more, or thirty per cent more.

Q. How much did you make in 1958?

A. I grossed over \$18,000 in 1958.

Q. And you could have made at least twenty-five per cent more?

A. That is what I believe, yes, sir.

Q. Dr. Hargrave, let me ask you this. In view of everything you have related here in your deposition and before the Court and jury with regard to

(Testimony of Dr. Robert L. Hargrave.)

your condition and due to the injury, in view of all of your examination of the X-rays and the way you feel and the pain that you have sustained, what you have related to us, and your loss of sleep and the radiation of pain down that left leg, and in view of all that with reference to your injury and the way you feel, do you have an opinion—I want you to answer this yes or no—do you have [131] an opinion whether or not your future earning capacity will be curtailed or not?

A. Yes, sir.

Q. To what percentage?

Mr. Blewett: To which I object at this time, your Honor. We are agreeable he put into the record his earnings for the past four or five years, whatever is involved. But he has not laid a foundation for this opinion. There are many factors that would enter in, and I think it is an improper question. There is no proper foundation and it calls for an opinion, and he has his own record which speaks for itself as to the earnings this man has. We are willing they go into the record.

Mr. Kouri: I am going to put them in. Then I will show all the earnings. I think, your Honor, certainly regardless of that, Dr. Hargrave is an expert witness. Even if he were a layman I think under the rules we would be allowed, after reviewing the facts as related, to have his opinion of his curtailment, if there is going to be any curtailment of his future earning capacity. If he does have an

(Testimony of Dr. Robert L. Hargrave.)

opinion I think we should be allowed to show what it is.

The Court: There is no question you can show what his earnings are and have been.

Mr. Kouri: Yes, sir.

The Court: I have some doubt about this. What was the question? [132]

Mr. Kouri: I asked what is your opinion as to what your future curtailed earning capacity will be, what percentage.

The Court: Well, I will permit argument on that outside of the presence of the jury.

Mr. Kouri: All right. For the time being we won't pursue it.

The Court: I will reserve a ruling on that.

Q. (By Mr. Kouri): Do you have a list you got from the records of the earnings you got?

A. You mean my income?

Q. The little slip you got of the record?

A. Yes, sir, right here.

Q. Let me see it please. I don't have '58 on there.

A. This is from medical only, gross from medical practice.

Q. Why don't you have '58?

A. It is a little over \$18,000. Because I haven't made up my income tax for '58.

Q. As far as you know, '58 is a little over \$18,000?

A. Yes, sir.

Q. I have this slip here, that is the one you handed me?

(Testimony of Dr. Robert L. Hargrave.)

A. We will say \$18,200. That is about right.

Q. That is for '58? [133] A. Yes.

Q. I am reading just the last five years, but you can have this if you want to go back further. 1953—\$13,477.80. 1954—\$13,679.50. 1955—\$15,815.15. 1956—\$13,255.23. 1957—\$14,680.70. 1958—\$18,200.00. It may be a few more dollars, more or less?

A. It wouldn't be much over.

Q. Do you go home from your office earlier than you used to before you got hurt? A. Yes, sir.

Q. Do you take as many cases in the hospitals now, and for the past 18 months, can you handle as many as you could before you got injured?

A. Oh, no, I can't do near the amount of work I could. I just can't do it.

Q. What about in your office practice, and in taking care of patients?

A. When I have had a full day I am tired and my back hurts quite a bit. If I do any lifting I will have trouble.

Q. You go to bed about what time?

A. About eight o'clock.

Q. Prior to the injury what time did you go to bed?

A. We used to stay up and visit people. We haven't called on anybody since I have been hurt, I don't believe.

Q. Is that due to the way you feel? [134]

A. Yes, sir.

Mr. Kouri: May we have a half moment, your Honor, please?

(Testimony of Dr. Robert L. Hargrave.)

(At this time there was a very brief recess)

Mr. Kouri: I believe that will be all. Mr. Blewett you may have the witness.

Cross Examination

Q. (By Mr. Blewett): Dr. Hargrave, I understand that you returned to Wichita Falls about 1946 or 1947?

A. Yes, sir, in the Fall of 1946.

Q. And you practiced there ever since that time?

A. Yes, sir, I have had an office there ever since that time.

Q. Have you ever practiced medicine in any other town other than where your army duty took you?

A. Well, I was—like I say, I was in the Veterans Administration a little while.

Q. Other than that, Doctor?

A. Yes, I practiced in Corpus Christi, after I originally went to Wichita Falls, and I stayed down there about a year or so and came back to Wichita Falls, Corpus Christi, Texas.

Q. What type of work did you do at Corpus Christi?

A. I went down there to do surgery. [135]

Q. About when was that, Doctor?

A. I think that was about 1935, maybe '36.

Q. Now in Wichita Falls, Texas, where you now maintain your home, I understand there is a population of what, around 120,000 or 110,000?

A. Probably so, over 100,000.

(Testimony of Dr. Robert L. Hargrave.)

Q. I believe you told me on your deposition, down in Texas, that part of the reason for your drop in income was due to the addition of new Doctors in town, didn't you?

A. I said it could be.

Q. That there was about an increase of twenty-five per cent of new Doctors in town?

A. I have checked that since I gave my deposition. I can give the exact figures, how many Doctors were there in various years.

Q. Well, what is approximately the increase in the number of Doctors?

A. Well, I have it here.

Q. I am willing to take your recollection on it, Doctor?

A. I do not know. I can read it off. I have it right here. In 1950—these are Doctors that are members of Wichita County Medical Society. In 1950 there were 100 Doctors. In 1953, 109 Doctors. In 1956, 121 Doctors. And in 1959 there were 126 Doctors.

Q. In 1956 there were 121 Doctors? [136]

A. Yes, sir.

Q. As compared with 109 the year before?

A. No, sir, three years before.

Q. Three years before? A. Yes, sir.

Q. And in 1950, 106 is it?

A. In 1950 there were 106. In 1953 there were 109. In 1956 with 121. And 1959 there were 126.

Q. There is approximately a twenty-six per cent

(Testimony of Dr. Robert L. Hargrave.)

increase then, isn't that correct, from 1959 over 1950, according to this?

A. From 1950 to the present there is a twenty-six per cent increase.

Q. And that is pretty close to what you estimated when you and I were taking your deposition in Texas?

A. Yes, but I gave it wrong. I said about thirty, and you asked me since 1956 on the deposition, but I understood you to really say from 1946, so I guessed about thirty Doctors.

Q. How many were there in 1946?

A. I do not know.

Q. But there has been about a twenty-six per cent increase in medical practitioners in your city since 1950? A. Yes, sir.

Q. And I think, as I say, you admitted that might have affected your earnings? [137]

A. That might have been some factor, yes, sir.

Q. Now, Doctor, do the X-rays that you have herein Court with you—you say you have seen them all yourself? Do I understand you correctly?

A. Yes, sir.

Q. And that you are going to produce them in Court here, is that what you said on the witness stand? A. I never said that.

Mr. Blewett: Well, maybe Mr. Kouri said that.

Mr. Kouri: I made the statement and they will be introduced properly by one who took them, under his direction and control. I am willing for them all to go in if you have no objection.

(Testimony of Dr. Robert L. Hargrave.)

(At this time there was discussion between counsel regarding putting the X-rays into evidence.)

Q. (By Mr. Blewett): Dr. Hargrave, have you taken those X-rays to any local Doctor and had any local radiologist look them over with the idea that he will present them and interpret them for you?

Mr. Kouri: I object to that as being immaterial and irrelevant.

The Court: Objection sustained.

Mr. Blewett: May I have just a moment?

The Court: It is about time for a recess. Court will be in recess until ten to four. [138] (jury admonished) 3:55 P.M.

(Whereupon at 4:10 P.M. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Further Cross Examination

Q. (By Mr. Blewett): Doctor, getting to the condition in your back which you complain of in the 10th dorsal, you have defined it here as a compression fracture of that vertebrae, haven't you?

A. Yes, sir.

Q. And you testified you saw X-rays which showed it to be a fracture? A. Yes, sir.

Q. Doctor, it is a fact, isn't it, that people have compression fractures and don't even know it?

A. That is correct.

Q. That is right, isn't it? A. Yes, sir.

Q. And the first time they ever become aware

(Testimony of Dr. Robert L. Hargrave.)

of it is in the course of an X-ray their Doctor calls their attention to it? A. Yes, sir.

Q. In fact, that isn't uncommon, is it?

A. Well, it occurs. I do not know how often.

Q. Well, I am sorry, you aren't an orthopedic man. You don't do too much orthopedic work, do you? A. Yes, I do orthopedic work. [139]

Q. I understood you to say, Doctor, you referred orthopedic cases to Dr. Van Deventer?

A. I did not say that.

Q. What did you say in that regard?

A. I don't remember any question in that regard.

Mr. Kouri: I object to that as misquoting the testimony. He asked that of Dr. Van Deventer.

Q. You were present when Dr. Van Deventer testified to that, weren't you, that you had referred cases to him?

A. Yes, two or three cases he said.

Q. I am sorry. I knew it took place. Now you testified that you saw Dr. Maxfield. Dr. Maxfield did not treat you, did he?

A. He told me to take pills and stay in bed.

Q. You never consulted him for actual treatment in your case, did you? A. I saw him.

Q. Didn't you see him at Bethania Hospital one day? A. Yes, and at his office later on.

Q. And he prescribed pills? Did he prescribe anything else?

A. Yes, he said to take exercises. He did not outline any exercises. He said take exercises.

(Testimony of Dr. Robert L. Hargrave.)

Q. Was that the same type of exercise Dr. Wickstrom prescribed? [140]

A. He did not say what kind to take. He said take exercises.

Q. Well, other than the exercises which Doctor Wickstrom prescribed, was there any other treatment that Wickstrom or any other Doctor prescribed for you?

A. No, sir, except at first there. I would say no, no other treatment.

Q. Now in serious cases of compression fractures there are certain types of treatment that are employed, aren't they?

A. Am I qualified as an expert witness now?

Q. I am perfectly willing to leave that to your judgment Doctor.

Q. Would you repeat the question please?

Q. I say, where you have a serious compression fracture there are certain types of treatments that have to do with extension, isn't that right?

A. Yes, sir, in certain cases.

Q. That is right. Now at the time you visited Dr. Wickstrom did you go down there to see Dr. Wickstrom for your back or did you go down there to visit with your son?

A. I went down there to see about my back. The reason I went down there was I had a second X-ray made at the Bethania Hospital about a month after the first X-ray was made, and to me it showed an increase in the compression of the fracture.

(Testimony of Dr. Robert L. Hargrave.)

Q. Well, you visited with your son while you were there, [141] there is no doubt, didn't you?

A. Well, yes.

Q. Now is there any Doctor locally in Wichita Falls other than Maxfield who examined you, other than Dr. Van Deventer, whom you have identified today?

A. That examined me or treated me?

Q. No other Doctor?

A. No, sir.

Q. Dr. Van Deventer didn't treat you, did he?

A. No, sir.

Q. Now I will ask you, Doctor, if at the time of taking your deposition I did not ask you this question: "Why did you go to Dr. Wickstrom, any personal reason?" to which you answered: "No, I never knew Dr. Wickstrom. My boy was in New Orleans. He was a medical student in New Orleans and working with Dr. Wickstrom, as a medical student." Do you remember giving that answer?

A. Yes, I gave that answer.

Q. I thought I just asked you if you had any personal reason for going to Dr. Wickstrom. I thought you said no. In your deposition you said you went because your boy was in New Orleans?

A. I do not know whether that is a personal reason or not.

Mr. Kouri: What page, counsel?

Mr. Blewett: Page 14. [142]

Q. Doctor, getting back now to the office hours that you say you maintained, will you tell the Court and the jury at this time how and in what respect the office hours you have maintained since this acci-

(Testimony of Dr. Robert L. Hargrave.)

dent are different from the office hours that you maintained prior to this alleged accident?

A. Yes, sir, I close the office up earlier than I did before.

Q. How late did you keep the office open prior to the June 23, 1956, incident?

A. Five o'clock.

Q. And since that time how late do you keep it open?

A. About four thirty. Sometimes I go earlier.

Q. And other than that your hours are much the same? A. I would think so, yes, sir.

Q. You have your office in what building, Doctor? A. Hamilton Building.

Q. Is that the same building in which you have been officed since before the accident?

A. Yes, sir.

Q. As I recall that is quite a sizeable building, isn't it? It is a big building for a town that size?

A. It is eleven stories high, I think.

Q. Now getting back to the 23rd day of June, 1956, Doctor, would you be kind enough, at least for the moment, if I may hand you what is known as the Plaintiff's Exhibit #10, [143] I would like for you to look at it without the screen for a moment.

A. Yes, I can identify it. I know what it is.

Q. I believe you testified that that exhibit #10, was the last picture that you took on the way back, until you took the picture of the hotel itself, is that correct? A. Yes, sir, that is correct.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now if you can, Doctor, state how far you were at the time you took this picture from the hotel itself? By "hotel" I mean the Many Glacier Hotel?

A. I think it would be between one-fourth and one-half mile.

Q. At the time you took that picture was the hotel visible to you? A. No, sir.

Q. Now, Doctor, I observe here in the Court room you wear glasses. I believe you told me that your eyes with those glasses are corrected to twenty-twenty vision, is that correct?

A. They might not be that good.

Q. What would you say they are?

A. My eyes have gotten worse since the injury.

Q. Your eyes have gotten worse?

A. Yes, sir, at the time of the injury my vision was twenty-twenty, but I really believe they have gotten worse. [144] It is probably twenty-thirty now.

Q. Have you worn glasses for a long time?

A. Yes, sir, I have worn these same glasses for years.

Q. And when did you last have your eyes checked?

A. I had my eyes checked about a year ago, maybe two years ago.

Q. And the same glasses were prescribed for you?

A. I have avoided getting new glasses because

(Testimony of Dr. Robert L. Hargrave.)

my accommodation is changing and I am avoiding getting new glasses until the accommodation becomes stationary because I will have to wear bifocals and if I change them I will just have to get new glasses at that time.

Q. At the point where you took that picture which is now identified as Plaintiff's #10, where were you at the time you took this picture with reference to the trail itself, Doctor?

A. I was on the trail.

Q. You were on the trail? A. Yes, sir.

Q. And do you know, Doctor, which direction the trail goes at that point where you took that picture?

A. The general direction is east, because that lake is to the north.

Q. Well, at the time you took the picture what direction would you be facing, if you know? [145]

A. Probably north. I do not know. I would have to see a map to see just what the direction is. I think the trail runs from the lake to the hotel, it runs in a general direction of northeast, and therefore that picture was taken in a direction of northwest. It was taken off the side.

Q. At the time you took that picture were you mounted on your horse? A. Yes, sir.

Q. And in what direction was your horse faced, so far as the Dillon horse and your daughter's horse are concerned?

A. Well, it was faced toward them. Is that what you mean?

(Testimony of Dr. Robert L. Hargrave.)

Q. Well, I don't think I have ever been on this trail, Doctor. I am asking you for my own edification.

A. What is the question again?

Q. At the time you took this picture in what direction was your horse faced so far as your daughter Ann and Mr. Dillon were concerned?

A. I can't answer that. I do not know.

Q. Well, was your horse faced in the same direction as they were going?

A. That is back toward the Hotel?

Q. Yes?

A. Yes, the horse was faced back toward the Hotel.

Q. And as far as you are concerned, how did you take [146] that picture, from what angle? Looking in the same direction you were going?

A. No, I said it was taken from the side of the horse. In other words, I shot the picture off from the side of the horse.

Q. You turned from the side of the horse?

A. Yes.

Q. To your right or to your left?

A. To my left.

Q. At the time you took this last picture, which we have identified as #10, what did you do after you had taken this picture?

A. Well, I went on. I do not know whether I stopped the horse to take the picture or not. I might have made the picture with the horse walking. After that the best of my memory was the

(Testimony of Dr. Robert L. Hargrave.)

horse continued to walk. And Dillon and my daughter were up in front.

Q. Well, your testimony is that you do not know whether the horse was stopped at the time this picture was taken?

A. Yes, sir, that is my testimony. I do not know whether I stopped the horse to take the last picture or not.

Q. Well, I am not too much of a photographer or horseback rider, Doctor, but can you take a picture as clear as that appears to be on a moving horse? A. Yes, sir, you can. [147]

Q. What type of camera were you using?

A. A 35 millimeter.

Q. What make?

A. Contax, made by Zeiss.

Q. So at this time you do not know whether the horse was stopped or moving when this picture was taken? A. That is correct.

Q. From this time forward, after you completed this picture, what did you do with your camera equipment?

A. Well, I kept the camera equipment—it was around my neck.

Q. Well, while you were taking this picture, Doctor, how many hands do you use with your camera taking a picture? A. Two hands.

Q. Where were the reins of the horse?

A. I had the reins in my hands.

Q. You had the reins in your hands, Doctor?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Now after you took the picture, what did you do as far as the horse is concerned?

A. Well, I can't answer that, but if the horse was walking, well, he continued to walk, and if I did stop the horse, I started the horse up.

Q. Well, about how far from this point of this last picture did the horse walk from that point toward the riding post or the Hotel? [148]

A. Before—how far did he walk?

Q. Yes, sir?

A. I do not know. I don't remember exactly, but it was my recollection that there was more brush in front of us.

Q. Your recollection is now from the point where you took this picture on toward the Hotel there was more brush ahead of you?

A. Yes, because I could see Mr. Dillon and Ann going through some brush after I took that last picture.

Q. And at the time you took this last picture and immediately thereafter, how far was your daughter Ann ahead of you?

A. I don't recall how far she was ahead of me after I took the last picture, but when I saw them going through the brush in front, they were probably seventy-five feet ahead of me.

Q. And that would be right after you finished taking this last picture?

A. Yes, but I can't be positive about those points.

Q. Doctor, I don't expect you to be positive.

(Testimony of Dr. Robert L. Hargrave.)

A. It is hard to remember back two and a half years every little step.

Q. All I want you to do is give your best estimates. A. That is my best estimate.

Q. All I am trying to do is get the picture in my own [149] mind, and I have to do that so that I can ask you some questions. At the time you finished taking your picture which we have identified as #10, your daughter Ann and Mr. Dillon were within your sight? A. I believe so.

Q. And your best guess would be they were probably seventy-five feet in advance of you?

A. Yes, sir.

Q. Now what did your horse do at that time, if you can remember?

A. My horse was walking along.

Q. And about how far from that point forward did your horse continue to walk?

A. I do not know, I don't remember.

Q. Well, from your recollection of the trail at that point, would you be willing to give an estimate as to where your horse walked, whether or not your horse walked as far as Ann and Dillon were ahead of you at that time?

A. I do not know. I don't remember how far the horse walked, and I don't remember how long it was after I took the picture that I saw Ann and Mr. Dillon ahead of me.

Q. Well, do you have any recollection, Doctor, at this time as to how far Ann and Dillon might have

(Testimony of Dr. Robert L. Hargrave.)

traveled from the time you first saw them after the picture was taken until your horse started to run?

A. No, I can't say that. I do not know.

Q. Doctor, let's get at it from another way, if we can. Do you have in mind the point where you talked to Mr. Dillon after your horse finished the running you claim he did? A. Yes, sir.

Q. How would you identify that?

A. I think that point was about one-fourth mile from the hotel.

Q. Were there any land marks at that point which would allow for identification of where you and Mr. Dillon discussed that situation?

A. When my horse did the running it was in the clear. There was no brush on the side of the trail at all. It was out in the clear where my horse did the running and the country was fairly level, say for about seventy-five yards, and then it seemed like there was a small dip in front from the point where my horse started to run.

Q. From the point where your horse started to run in the clear could you see the Hotel?

A. No, sir.

Q. Would the hotel have been in sight had you been looking for it? A. No, sir.

Q. Well, from this point in the clearing where you say your horse started to run, did you from that point forward to [151] the hitching post or the hotel run into any other brush or timber along the trail? A. I don't think so.

Q. So from the point where your horse started

(Testimony of Dr. Robert L. Hargrave.)

to run it is your recollection that the trail was clear?

A. I think so. The trail was clear, yes, sir.

Q. Doctor, just by way of illustration for the time being, and your Honor, I have borrowed this picture for this purpose and if it goes into evidence I would like permission to withdraw it. I would like to ask the Doctor if he can refresh his recollection from the photograph. At this time, Doctor, would you be able to note on that picture approximately where your horse was at the time of the running? Do you want to look at it?

A. To me it doesn't look right. Let's see, where is that picture. What direction is that picture taken?

Q. Doctor, I did not take the picture. If Mr. Kouri would let me testify I would explain it as best I can.

Mr. Kouri: We have no objection to your testifying.

Q. It is my impression that embraces the hotel and an area from the trail where you were approaching the hotel. This would be the clearing you were talking about.

A. The clearing here?

Q. Yes?

A. That was not that close to the hotel. This thing, [152] the hotel, of course, I do not know how this picture was made or where it was made from.

Q. It is the Glacier National Park picture.

A. I can't tell what direction it is.

Q. Maybe I will put that picture in.

(Testimony of Dr. Robert L. Hargrave.)

A. I would have to know what direction that picture was taken in.

Q. I will defer this for a minute and get back to it later.

A. I never observed the Hotel from that direction.

Q. Well, going back now to where you talked with Mr. Dillon, you were present in Court this morning, were you not, Doctor Hargrave, when Mr. Dillon testified to the fact that the road was there and available for you to walk back to the hotel?

A. I knew the road was there.

Q. I am just trying to get a land mark for you, that is all.

A. I knew it was there, yes.

Q. I am not saying you did not know it was there. At the point where you talked with Mr. Dillon where was the road that joins the trail on which you were riding or the one on which you would have walked back to the Hotel had you walked? Do you know? A. The road? [153]

Q. Yes, the road you just said you knew was there? Where was it?

A. Well, we were on a road I guess.

Q. Well, you were on a road or a trail, is that right? A. Yes, sir.

Q. Now at the time you talked with Blacky Dillon, according to Blacky you and he were talking at a point where the service road came up to the trail as I remember his testimony. Do you have any recollection on that?

(Testimony of Dr. Robert L. Hargrave.)

A. No, sir, I couldn't identify that place. I couldn't identify that. I did not see any trail there.

Q. Well, how would you identify the place by landmark as to where you and Mr. Dillon discussed this incident of your horse running?

A. That place was about between one-fourth and one-half mile from the hotel, I would say.

Q. By way of landmarks, Doctor, please tell me if you will whether there was any brush on the trail at that point, whether there was foliage or tall timber or small timber or what?

A. I couldn't possibly remember all that.

Q. Well, when you say it was in a clearing, was it absolutely clear from that point to the Hotel?

A. I believe it was, yes.

Q. And from that point to the Hotel what was the course [154] of the trail? Was it straight or was it a bending trail, or was it up hill and down hill or level?

A. It might have been up and down, and maybe curving some.

Q. When you say maybe, is that your best recollection?

A. I don't remember how it was exactly.

Q. Well, Doctor, on your direct examination I understood you to say that just before your horse started to run you came out of a brushy area, is that correct?

A. I said that possibly happened, yes, sir.

Q. And at that time you couldn't see Dillon or your daughter Ann?

(Testimony of Dr. Robert L. Hargrave.)

A. I only saw Dillon and my daughter Ann immediately before, a split second before or after my horse started to run.

Q. But you do not know whether it was before or after, do you?

A. I do not know, no. It was either before or after. Probably after.

Q. Now directing your attention again to your deposition which I took in Texas, Doctor, I will direct your attention to page 33, line 10, wherein I asked you, "Now just prior to that and before this horse that you were on started to run, did you see them then?" Answer: "No, I didn't see them take off and start to run. The reason I didn't, I think, was [155] because there were bushes there and you couldn't see." Is that your testimony at this trial?

A. Well, that is my opinion there probably were bushes there.

Q. But your testimony is that you never did see the horses run or them before you started to run?

A. Since I made that deposition I have had occasion to recollect this thing over, and my recollection might vary slightly with the deposition. I am telling it the way I see it right now at this moment.

Q. Well, going on with your deposition, Doctor, on page 33, I asked you again, when you first knew they were out in front of you or ahead of you, or else way ahead of you, and your answer was right after my horse started running. All I want, Doctor,

(Testimony of Dr. Robert L. Hargrave.)

is to know if that is your testimony now or whether your testimony upon this trial now is that you saw them before your horse started to run?

A. It was either after my horse started or a split second before. It was right at the time my horse started to run.

Q. Then you at no time saw your daughter or Dillon on a running horse until that time?

A. That is correct.

Q. And you at no time ever heard those horses run until when? [156]

A. I never did hear the horses run.

Q. Now, Doctor, would you describe to the Court and the jury here the action, if you can, of your horse when it started to run?

A. The horse was walking and it just started to run.

Q. Well, did it jump?

A. It just started to run, that is all I know.

Q. Was it trotting? A. Sir?

Q. Was it trotting? A. It was running.

Q. Well, Doctor, was it trotting or galloping or in a fast walk, or what?

Mr. Kouri: I object to that as being repetitious, your Honor. He answered the question twice that it was running. It is argumentative.

The Court: I think he might be permitted to inquire what he means by running, whether that includes trotting or galloping, I do not know. It should be limited to that.

Mr. Kouri: He has said it was running, your

(Testimony of Dr. Robert L. Hargrave.)

Honor. Your testimony is that the horse started to run? A. Yes.

Q. (By Mr. Blewett): Do you know whether the horse was trotting or galloping? [157]

A. To me it was running. It might have been galloping, that I do not know. To me, it was running. It seems to me like the horse just took off and started to run. The difference between galloping and trotting, you can't observe them with your eye, you can't determine that with your eye.

Q. I believe in your complaint you set forth that when the horse started to run he threw you forward?

Mr. Kouri: I don't believe the complaint has been offered in evidence. It is not evidence, the complaint or the answer.

The Court: What was the testimony on direct examination? Wasn't that to that effect?

Mr. Blewett: The testimony on direct went in he was bounced up and down in the saddle.

A. Yes, sir.

The Court: You may inquire just what did happen.

Q. (By Mr. Blewett): In your complaint, Doctor, you alleged that the horse threw you violently forward and flexed your back. Now what does "flexing" of the back mean, Doctor?

A. Well, the horse did not throw me violently forward and flex—like I said before, that complaint is drawn by my Attorney. I never made the statement that the horse violently threw me forward.

(Testimony of Dr. Robert L. Hargrave.)

Q. You did not tell that to your Attorney, is that it? [158]

A. No, sir, I didn't. He got that information from Dr. Wickstrom, and I never did tell Dr. Wickstrom that.

Q. Well, your testimony now is that the horse didn't throw you forward?

A. I never did testify the horse threw me forward.

Q. And you testify that you never told Dr. Wickstrom that? A. No, sir.

Q. And you never told your Attorney that?

A. No. The horse couldn't possibly throw you forward.

Q. Just answer me the question if you will, because it may come in later in the case. How is the body flexed? What is a flexion?

A. How is a flexion fracture caused?

Q. Doctor, I will rephrase my question, which is, how does a person flex his back?

A. He bends over forward.

Q. Now when this horse started running with you, Doctor, what if you can now recall did you first do when the horse first started to run?

A. Well, I tried to stop the horse.

Q. And how did you do that?

A. Pulled on the reins.

Q. Did you attempt to stand up in the stirrups or anything? [159]

A. I couldn't because I was back in the stirrups. When the horse took off he threw me off balance

(Testimony of Dr. Robert L. Hargrave.)

and my feet were in front and I couldn't get up on the stirrups.

Q. Your feet were in the stirrups at all times?

A. Yes, sir. I couldn't get the seat back. I couldn't stand up in the stirrups because I was thrown off balance.

Q. And how far in your opinion did your horse run from the time it first started to run until it stopped?

A. Well, it ran on down to where they were. I hollered and they stopped, and probably seventy-five yards.

Q. I believe you testified on direct examination, Doctor, that the horse took about three paces before you felt anything wrong, is that right?

A. Yes, sir, I think that is right, three or four.

Q. Do you now know what distance this horse would have covered in those three or four paces?

A. No, but he was going pretty fast. I do not know. I never tried to figure that out. I couldn't answer that.

Q. And what do you have to say, Doctor, as to the gait that the horse maintained? Was it the same speed from the time you started until you reached Blacky or did it vary?

A. Well, I do not know. He just started running. I presume it took some time to get going good, and I tried to stop the horse. I pulled on the reins. I couldn't get the horse to stop. [160]

Q. You mean it took him a little while to get started?

(Testimony of Dr. Robert L. Hargrave.)

A. Not very long. He just took right off. It had to give a little bit, maybe two or three steps to get started good.

Q. Did the horse rear or shy away?

A. No, sir.

Q. It just started from a walking to a running gait?

A. Yes, sir.

Q. And you at all times remained in the saddle with your feet in the stirrups?

A. Yes, sir.

Q. And I believe you said you had your hands on the reins?

A. Yes, sir.

Q. Did you at any time reach for the horn of the saddle?

A. I don't recall.

Q. Now when your horse reached the point where Blacky Dillon and your daughter were, which horse did it meet first?

A. I do not know, but I believe they were about abreast then, the two horses.

Q. And where did your horse come to a stop with reference to the two horses on which Dillon and your daughter were mounted?

A. It seems to me like my daughter's horse was to the right and Dillon's was to the left, although I can't be positive about that. [161]

Q. Where did your horse come to a stop?

A. It came to a stop there when they turned around. They started back. They stopped their horses and started back, and by that time my horse was up there to them.

The Court: It is about time to suspend for the afternoon. We will adjourn now until 9:30 tomor-

(Testimony of Dr. Robert L. Hargrave.)

row morning. (Jury admonished.) Court is now adjourned until 9:30 tomorrow morning. (4:55 P.M.) [162]

January 22, 1959 (9:30 A.M.)

The Court: You may proceed.

(Doctor Hargrave was recalled to the witness stand.)

Further Cross Examination

Q. (By Mr. Blewett): Doctor, just a few more questions to carry on from where we left off last night. You mentioned in response to some of the questions I asked you that your vision now isn't as good as it was, and I would like to direct your attention to the deposition which you gave, in which I asked you this question:

"Q. Do you know to what correction your eyes are with your glasses? A. My vision is good.

Q. Twenty-twenty, with glasses?

A. Yes, sir.

Q. And was it on that date? (Referring to the time of the accident.)

A. Yes, sir, my vision is good."

Now have your eyes changed in the last two weeks, Doctor?

A. No, sir. They might have a little bit, but not much though.

Q. Now, Doctor, getting back to the last pic-

(Testimony of Dr. Robert L. Hargrave.)

ture which you took, you said that you had a Con-tax camera? A. Yes, sir. [163]

Q. And is that the type of camera that you hold up in front of your eyes? A. Yes, sir.

Q. And is that the position in which you were holding the camera and reins on that horse when you took that last picture? A. Yes, sir.

Q. I understand, Doctor, that from your testimony yesterday you can't recall whether or not your horse was actually stopped at any time while you were taking these pictures, is that right?

A. Yes, sir, I do not know whether the horse was stopped or whether he was walking.

Q. There is the possibility that you might have stopped the horse then to take the pictures, is that right?

A. No, sir, just the last picture.

Q. Just the last picture? A. Yes, sir.

Q. And do you feel that you did stop the horse to take that last picture?

A. I do not know, I might have stopped the horse.

Q. You might have? A. Yes.

Mr. Blewett: I think that is all. [164]

Redirect Examination

Q. (By Mr. Kouri): Doctor, just a few questions. Were you doing a lot of surgery before you went in the service? A. Yes, sir.

Q. Was a few, a little, or a lot of that referred from other Doctors to you?

(Testimony of Dr. Robert L. Hargrave.)

A. I was doing quite a bit.

Q. What you call referrals?

A. Yes, sir.

Q. And were you specializing in any special type of surgery at that time?

A. I was doing neck surgery at that time, thyroid surgery.

Q. Then what year did you go into the service?

A. 1942.

Q. Were you subjected to the draft?

A. I had to register for the draft.

Q. I mean were you drafted or did you volunteer?

A. No, sir, I went in. I got a commission as an officer.

Q. You volunteered? A. Yes, sir.

Q. Now as you told us, and I am not trying to repeat, there was about a four year period you were in the medical department? [165]

Mr. Blewett: Your Honor, if I may at this time, I did not go into any of this on cross examination.

The Court: I can't see the purpose of it. Objection sustained.

Mr. Kouri: Very well.

Q. Did you observe the X-rays that were made of your spine after they were made?

A. Yes, sir.

Q. Were they made under your supervision with these other Doctors, the X-rays?

A. Yes, sir, except the ones at Teoro *Infirmity*.

(Testimony of Dr. Robert L. Hargrave.)

Q. That was——

A. At New Orleans, the first ones I had made at New Orleans.

Q. Would you step down please, Doctor, over here to where the jury can see. Doctor, those X-rays there, would you stand over this way, Doctor, and get those X-rays?

A. These are the first X-rays that were made.

Q. Who made these X-rays you are going to show?

A. These X-rays were made by Dr. Ane's technician in New Orleans.

Q. Would you please show them to the jury one by one?

A. This one was made in October 11, 1956.

Q. Would you please show it?

A. Yes. This is not the first one, but this is made [166] four months after the first one, and it shows a compression fracture of the 10th thoracic vertebrae.

Q. Did you measure those vertebrae in that thoracic area?

A. Yes, we have measured that repeatedly on the films.

Mr. Kouri: Let me offer this.

A. This was the last one made.

The Court: Don't you think that should be marked so that the record will be clear? It will be awfully confused otherwise. If you are going to use the other one, have that marked too.

Mr. Blewett: Doctor, would you mind telling me

(Testimony of Dr. Robert L. Hargrave.)

what P.13 is now? That is an X-ray taken on what date? A. October 11, 1956.

Mr. Blewett: By Ane you say? A. Yes.

Q. (By Mr. Kouri): And P. 14 was taken what date?

A. P. 14 was taken by Dr. Ane on August 4, 1958. In other words, they are almost two years different in the X-rays.

Q. That is Dr. Ane's too?

A. Yes, sir, and it shows—these films are about the same density, the vertebrae are, the ones above and below. This might be just a little denser, but they are just about the same exposure on the first X-ray picture that was taken. On the second X-ray picture at this point here (indicating) [167] you can see there is quite a bit more calcification at this point.

Q. At this point you pointed to P. 14 in comparison to P. 13 on that vertebrae?

A. Yes, it shows a decrease in the height of the vertebrae anteriorally; and there is some calcification around here that is more distinct than it was on previous films, which will be shown with Dr. Van Deventer's deposition. Now then, the picture that was made almost two years later shows a lot more density in the vertebrae. It is calcified. It is denser than this vertebrae here.

Mr. Blewett: Just a moment, Doctor. Will I be given the right to cross examine him on this?

The Court: Yes. This is really not strictly speaking re-direct examination. It is direct exam-

(Testimony of Dr. Robert L. Hargrave.)

ination. You will be given an opportunity to cross examine.

Mr. Blewett: Excuse me for interrupting, Doctor.

A. That is all right. And this shows here on (which the edge is calcified in this X-ray film it shows that is being destroyed, obliterated, rather than here. So this one here indicates a healing process over this, and also this flat on the bottom of this vertebrae, this P. 13, is less dense than this. To me this indicates a healing fracture, because in two years there is quite a bit more calcification than one would expect in a normal person, and then that is confined to [168] this vertebrae, as compared to the other vertebrae. In addition there is apparently some narrowing of the space between the 10th and 11th vertebrae.

Q. Can a compression fracture cause narrowing of that space? A. Yes, sir.

Q. What is that space called?

A. That is an intervertebral space.

Q. Is it called the disc area?

A. Well, the disc is in this space. This embryologically, your whole spine is developed as one piece, and then it differentiates out into different segments. In other words, different segments become calcified and in the part in between is cartilage.

Q. Doctor, let me ask you this. Is that narrowing of the space in between you say vertebrae 10 and 11? A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. If it is narrow that way, what does that mean say with regard to the future? Would through nature the thing expand and get back to normal, or is that possible?

A. No, I think that is a permanent condition.

Q. A permanent condition?

A. In other words, I don't believe that will change any.

Q. Could the condition you have described there result in a rupture of that disc?

Mr. Blewett: That is a leading question. [169]

Mr. Kouri: I withdraw the question. Doctor, if you will please, we will set these aside. We offer them in evidence, Mr. Blewett.

Mr. Blewett: Your Honor, I think they have all been stipulated, all the X-rays he presents will be, if he identifies them can go into evidence.

The Court: Plaintiff's 13 and 14 are received in evidence without objection.

(Whereupon Plaintiff's Exhibits #13 and #14, being X-rays, were admitted into evidence.)

Q. (By Mr. Kouri): Will you put to the shadow box Plaintiff's Exhibit #15?

A. This was taken by Dr. Ane on the same date as that first one we had before, on October 11, 1956. And this is not a direct lateral view or side view. It is an oblique view, and it shows at one point—you can't see it——

Q. But point it out there?

A. Right here it shows where the inferior bor-

(Testimony of Dr. Robert L. Hargrave.)

der of this vertebrae is broken through, and you can see the fracture line right through here (indicating). If you look you can see it here obliquely.

Q. Can you tell by looking at that light up there? A. Yes.

Mr. Kouri: We will pass that to the jury. We offer that in evidence. [170]

Mr. Blewett: No objection.

The Court: Plaintiff's #15 is received without objection.

(Whereupon Plaintiff's Exhibit #15, being an X-ray, was admitted into evidence.)

A. The measurements vary on the thing, but Dr. Ane's machine is set at a certain difference, it gives more accurate measurements.

Q. Where is that?

A. That is the ones I looked at. I know what they are. I can give you the measurements, but they are not made on the film. They all show the same, the ones Dr. Ane made.

Q. Show me the ones we want to use to show the narrowness.

A. They are not written on. They would be all the same. It is marked here what he measured. They would have to be measured out, but I know what they are.

Mr. Kouri: We offer #17 in evidence.

Mr. Blewett: May I ask you a question, has #16 been identified?

The Court: No, it has not.

(Testimony of Dr. Robert L. Hargrave.)

Mr. Kouri: No, we haven't offered it. #17 is offered in evidence.

The Court: #17 is received.

(Whereupon Plaintiff's Exhibit #17, being an X-ray, was admitted into evidence.) [171]

Q. (By Mr. Kouri): Now, Doctor, identify for the purpose of the record.

A. Yes, this is made by Dr. Ane. This is made on March 20, 1957.

Q. Yes, sir.

A. Now the measurements of these vertebrae on all of Dr. Ane's pictures have been constant, and we have measured them together and I know what they are. They are not marked on the film.

Q. Please tell us what the measurements are?

A. The measurement of the vertebrae above, between here and here (indicating) is 25 centimeters.

Q. You are pointing to #9?

A. Yes, the 9th thoracic.

Q. All right, what is the measurement of #10?

A. 10 is 20 centimeters.

Q. A difference of how many?

A. It would be a difference of 5. And #11 is 26 centimeters.

Q. You are now referring to thoracic vertebrae #10 that measures 20 centimeters?

A. Yes, this one measures 20. Thoracic 10 measures 20 and the one above measures 25, and the one below 26.

(Testimony of Dr. Robert L. Hargrave.)

Q. Are they all supposed to be about the same depth? [172]

A. No, sir, they get larger as the vertebrae go down.

Q. But would there be that much difference? What would cause that?

A. These vertebrae are decreasing in size. They would be smaller, but the increase in size as one goes down, so that if this one is 25 and the one below would be 26, one would expect the one in the middle to be between 25 and 26, which would be 25½ about.

Q. Let me ask you this. Could that be a congenital condition? That is, born that way?

A. I know that is not it, because I have reason to know that I wasn't born that way, because I have seen—I saw a picture of my back in that same region in 1950 and it showed nothing like that at all. It was normal.

Q. When you got out of the service, of course, tell us about did you have anything regarding that?

A. They did not X-ray my thoracic spine.

Mr. Kouri: We offered I believe #17?

The Court: It has been received.

Q. Are there any more you think would shed any light?

A. No, I think they are all about the same.

(At this time Dr. Hargrave resumed the witness stand.)

Mr. Kouri: I believe that is all. [173]

(Testimony of Dr. Robert L. Hargrave.)

Recross Examination

Q. (By Mr. Blewett): Dr. Hargrave, maybe I misunderstood your answer you just gave, but you said in 1950 your back was normal. Did I understand you correctly?

A. Yes, sir. I mean the thoracic part of my back was normal.

Q. I was going to say, you have scoliosis, don't you? A. Yes.

Q. For the sake of the jury, that is curvature?

A. Yes.

Q. You have a hollow back too, don't you?

A. I do not know whether I have one or not.

Q. Do you know what a hollow back is, Doctor?

A. Yes, it is lardosis.

Q. You say you do not know whether you have one or not?

A. No. Everybody has a little bit.

Q. Pardon?

A. Everyone has some lardosis.

Q. Well, scoliosis is curvature of the spine, isn't it? A. That is correct.

Q. And a lardosis is what?

A. An anterior curvature.

Q. Like that (indicating)? A. Yes. [174]

Q. And scoliosis goes like that (indicating)?

A. Scoliosis is lateral curvature.

Q. Doctor, I understand the first X-rays taken of your back following this accident were taken at

(Testimony of Dr. Robert L. Hargrave.)

Bethania Hospital, in Wichita Falls, isn't that correct? A. Yes.

Q. And on what date was the first X-ray taken?

A. On July 2nd.

Q. Would you get that X-ray please? Doctor, if it would be more convenient you can certainly get out of the chair and work at the table where it won't be so uncomfortable for you.

A. (Searches in X-rays) I will have to go over there and go through all of them and try to find it. Yes, sir, this one right here (hands to counsel).

Q. How many X-rays were taken on that day, Doctor?

A. I believe two. There were a front and side picture. Do you want the front picture too?

Q. Let's just take a look at this one first.

A. That is technically not a very good picture.

Q. Doctor, we will show this to the jury in just a minute. I think it might speed it up if we take a look at it here. Will you tell me what portion of the spine this is, Doctor?

A. This is the lumbar portion. [175]

Q. Excuse me, I meant is this the anterior or posterior portion of the spine right there?

A. That is the anterior portion.

Q. And do you know who marked the X-rays here? A. No, sir.

Q. Well, from your looking at that X-ray, the vertebrae which is opposite the circle marked T 10 would be the 10th dorsal? A. That is right.

Q. And would you tell me, just looking at the

(Testimony of Dr. Robert L. Hargrave.)

edge of the vertebrae at the top there I believe what we call the superior and inferior surfaces, isn't that right? The top is the superior surface?

A. Yes.

Q. And the bottom is the inferior surface, is that correct? A. Yes, sir.

Q. Now tell me what that little prolongation or protrusion is on the anterior surface of T 10?

A. That is hypertrophic lipping.

Q. That is arthritis?

A. That is degenerative changes.

Q. This X-ray was taken on July 2, 1956?

A. Yes, sir, that is normal condition.

Q. That is normal condition? [176]

A. Yes, sir.

Q. Now, Doctor, take a look at the rest of the vertebrae in that picture and tell me in your opinion if the prolongation at T 10 is greater than it is on the other vertebrae?

A. That is right, but that is because that is the most flexible part of the spine. That is where the motion is more frequently.

Q. Your answer to that is there is more hypertrophic condition on T 10? A. Yes.

Q. This accident occurred on June 23rd, didn't it? A. Yes, sir.

Q. This X-ray was taken——

A. July 2nd.

Q. July 2nd, or about nine days later?

A. Yes, sir.

(Testimony of Dr. Robert L. Hargrave.)

Q. Would that hypertrophic condition that appears there have grown in nine days?

A. No, sir, that was there. That was there in 1950, but it was not as great as it was at this time.

Q. Then in 1950 you did not have a normal back, did you?

A. That is normal condition. I had scoliosis.

Q. And you had hypertrophic growth?

A. Yes, but the hypertrophic growth is normal.

Q. In 1950 you would have been about fifty years of age? [177]

A. No, sir.

Q. How old would you have been then?

A. Well, I am 54 now.

Q. In 1956 then you should have been about 51?

A. In 1950 you said.

The Court: 46 I think, is that right, Doctor.

A. I would be about 46.

Q. When you were 46 you are saying that the prolongation of hypertrophic spurs on T 10 was normal for a person 46 years of age, is that right?

A. I can't tell you about that particular vertebrae, but I can tell you about all of them, because I did not pay any special attention to that vertebrae at that time. I saw the X-rays of my back and it showed a little spurring throughout, which was considered normal.

Q. You can be seated if you care to.

A. (Resumes stand.)

Q. Will you now for a moment take any one of these other ones here—do you have a larger picture

(Testimony of Dr. Robert L. Hargrave.)

of your spine that was taken say two years after the accident, or this injury you claim?

A. Yes, there might be a larger one there.

Q. Maybe you can tell from one of these Doctor—take a look at Plaintiff's #14, which is the exhibit you introduced a few minutes ago, and then take a look at the exhibit that is [178] now under consideration?

The Court: Shouldn't that be identified? Has that been identified?

Mr. Blewett: I will offer in evidence Plaintiff's Exhibit #16, the X-ray.

Mr. Kouri: No objection.

The Court: The exhibit marked Plaintiff's Exhibit #16 is received without objection, offered by the Defendant.

(Whereupon Plaintiff's Exhibit #16, being an X-ray, was admitted into evidence.)

Q. (By Mr. Blewett): Are these the same views, Doctor?

A. Yes, sir. This picture here is not clear. It doesn't have the same exposure as this, and it is difficult to compare those—probably not exactly at the same angle.

Q. Well, Doctor, would you with a pencil—and, Doctor, let me ask you this question, and you can go on if you will. Will you show the jury here what you have identified as a hypertrophic spur in what is known as the thoracic or dorsal 10th vertebrae?

A. There is a spur here and here (indicating), spurs here and here.

(Testimony of Dr. Robert L. Hargrave.)

Q. Which of these spurs in your opinion are the more pronounced?

A. It looks like this is here between the 9th and 10th in front. [179]

Q. Right at what we call the superior surface of the 10th dorsal vertebrae, is that correct?

A. Yes. This other view taken two years after shows that is gone, so I can't put too much emphasis on that.

Q. That shows what?

A. That isn't present in this last picture.

Q. Two years later?

A. It must be a little variation in the angle of it.

Q. And that does make a difference in how the vertebrae looks, doesn't it, Doctor?

A. I think so, yes.

Q. Now, Doctor, you allege that as a result of this incident and the injury to your vertebrae, you have suffered hypertrophic spurring of the lumbar vertebrae, and particular around the lumber vertebrae #4. Now from your testimony here, I understand the only complaint you have had now since this incident has to do with the dorsal vertebrae?

A. Except the left foot. I have a burning pain in the bottom of my left foot.

Q. And you also allege that you had damage to the 10th and 11th dorsal spinus process. Now is there any damage to the spinal process there other than what you claim is a compression of the 10th dorsal?

(Testimony of Dr. Robert L. Hargrave.)

A. Spinal process? No, there is no injury to the spinus process. [180]

Q. Now, Doctor, have you had occasion to do much work with orthopedics such as is involved here? A. Well, some, yes.

Q. Have you had occasion to treat a compression fracture of the 10th dorsal vertebrae?

A. I do not know about that particular vertebrae, but I have treated fractures of the dorsal spine.

Q. Doctor, will you tell me whether or not in your opinion the degree of compression which you have described here would be considered minimal, mild or severe?

A. Well, I don't think it is minimal now.

Q. You would say it is mild?

A. I think it would be moderate. There is a decrease of about 20 per cent in the height of the vertebrae.

Q. That is in the range of what is called a mild compression, isn't it?

A. I wouldn't think so, not 20 per cent.

Q. Well, do you know, Doctor?

A. What?

Q. What is the range of compression that is embraced within the term "mild compression"?

A. No, I do not know.

Q. You do not know?

A. No, who embraces that?

Q. Well, I don't want to engage in an argument on that, [181] Doctor, I am just asking you if you

(Testimony of Dr. Robert L. Hargrave.)

know. Now, Doctor, you said something about that you were having some trouble in your right foot. Do you know whether or not there are any nerve connections or nerve endings that originate in the area of the dorsal vertebrae that lead to or are connected with the nerve endings in the lower extremities? A. Only through the spinal cord.

Q. Only through the spinal column?

A. Yes, sir.

Q. And isn't it a fact that, Doctor, the dorsal vertebrae are connected with the ribs?

A. Yes, the ribs are attached to them.

Q. And the radiation or sensation doesn't go from the dorsal area to the lower extremities does it? That originates in the lumber area, doesn't it?

A. Yes, sir.

Mr. Blewett: I believe that is all.

Further Redirect Examination

Q. (By Mr. Kouri): In view of that last question on recross examination, in the lumber area what nerve radiates down from that area down to the lower extremities, the legs?

Mr. Blewett: Just a moment. I understood the Doctor to testify he has had no trouble with his back area since 1950, [182] that the only trouble is in the dorsal area that he has. I just want it understood his main complaint, as I understand it from his testimony, is in the 10th and 11th dorsal vertebrae.

The Court: You may answer it.

(Testimony of Dr. Robert L. Hargrave.)

Q. What nerve radiates from the lower back down?

A. The sciatic nerve and its branches.

Q. If there is a pinching there in the lower part of that nerve would it cause any pain to radiate down the legs?

Mr. Blewett: I raise the same objection. There is no evidence in this case about that nerve there, no contention the lumbar area is involved.

Mr. Kouri: He has testified he has pain in the foot down there.

The Court: I will let him answer and see if it is connected up.

Q. The question was, if there is a pinching in the lumbar area, will it cause pain to radiate down to the legs, down to the toes even? A. Yes.

Q. This plastic model, I wish you would point to the jury and show them where the 10th thoracic vertebrae is?

A. You would have to start down here (indicating).

Q. Go from the bottom up? This is the lumbar?

A. This is lumbar vertebrae, 5, 4, 3, 2 — this would be the 12th thoracic, the 11th thoracic and the 10th thoracic. [183]

Q. And on?

A. And the 9th, and so on.

Q. What are these little wide things? What do they represent on this?

A. They represent the inter-vertebral discs.

Q. What substances are they made out of?

(Testimony of Dr. Robert L. Hargrave.)

A. They are made of cartilage, and in the middle of it is kind of jelly.

Mr. Kouri: Thank you, Doctor, I believe that is all.

Mr. Blewett: May I ask one more question.

The Court: You may.

Further Recross Examination

Q. (By Mr. Blewett): Doctor, I want to be sure, would you point out to the jury which is the anterior and which is the posterior portion of the spinal column. Did I ask you that, or did you have that on the box? A. You asked me here.

Q. May I use this model?

Mr. Kouri: Certainly, sir.

Q. Would you point out to the jury from the model?

The Court: It is just for illustrative purposes?

A. This is the front, of course, of the vertebrae.

Q. Directing your attention, Doctor, to a model skeleton [184] or a model of the vertebral area of the back, would you point out to the jury which is the anterior and which is the posterior portion of the spine?

A. Well, this is the front of the spine (indicating.)

Q. That is anterior, isn't it?

A. Yes, sir, and this is the posterior portion (indicating).

Q. And in connection with what portion of the spine is the spinal cord or column located?

(Testimony of Dr. Robert L. Hargrave.)

A. It is posterior to the vertebrae.

Q. It is posterior?

A. It is in this canal here (indicating).

Q. So it is posterior to the vertebrae?

A. Yes, sir, it is in the canal. There is a hole that goes through there. You can see through there.

Q. And the arthritic spurs you have pointed out are on the anterior portion, aren't they?

A. Yes, sir.

Q. Away from the spinal column or the cord?

A. Yes. There are probably some on the back too.

Q. There is no evidence in the X-rays?

A. There might be. I think there is. They are not pronounced.

Q. They are more pronounced away from the nerve center?

A. Yes, there is no nerve center up in front.

Mr. Blewett: I believe that is all, your Honor.

Mr. Kouri: That is all, Doctor.

(Witness excused.) [185]

Mr. Kouri: I have a short deposition, your Honor.

The Court: Very well, we will take that before the recess.

Mr. Kouri: I would like to tell the jury we will read the deposition of Mrs. R. G. Ryan, which was taken before a duly authorized Court Reporter in Wichita Falls, Texas, where I appeared as Attorney for the plaintiff, and Mr. Alex Blewett, Jr., as At-

torney for the defendant, and the deposition was taken on the 5th of January, 1959. Mr. Bretz will read the questions and I will read the answers.

Mr. Blewett: Unless you wish to read it in, I am willing it go in.

Mr. Kouri: We want to present our case.

The Court: I take it there are no objections?

Mr. Blewett: No, your Honor.

The Court: You may use this copy.

(Whereupon Mr. Bretz and Mr. Kouri read the deposition of Mrs. R. G. Ryan, as follows:)

DEPOSITION OF MRS. R. G. RYAN

Direct Examination

“Q. (By Mr. Kouri): Please state your name to the court and jury? A. Mrs. R. G. Ryan.

Q. Where do you live, Mrs. Ryan?

A. 1822 Huff.

Q. What city? [186]

A. Wichita Falls, Texas.

Q. How long have you lived in Wichita Falls?

A. Close to ten years.

Q. Are you in business yourself, or are you a home maker? A. I'm a home maker.

Q. What does your husband do?

A. He is a geologist.

Q. What particular type of geological work does he do?

A. He is a consulting geologist and also a professor at Midwestern University.

(Deposition of Mrs. R. G. Ryan.)

Q. Is Midwestern University located in Wichita Falls? A. It is.

Q. Do you know the plaintiff, Dr. Robert Hargrave? A. I do.

Q. How long have you known him?

A. Since we moved here, around ten years.

Q. You are his next-door neighbor?

A. Yes.

Q. You know Mrs. Hargrave and the rest of the family? A. Yes.

Q. You visit one another like most neighbors?

A. Yes.

Q. Are you related to the Hargraves in any way? A. Not at all.

Q. Did you and your husband and other members of your [187] family take a vacation in June of 1956?

A. Yes, we went on quite an extended trip at that time.

Q. Did you go to the State of Montana?

A. We did, in route to Canada.

Q. What time did you leave home?

A. I can't say exactly; I think it was between June 5th and June 10th. I have the record.

Q. Who went along?

A. I can't give you all the names of our party.

Q. Just your family.

A. My husband and daughter and myself.

Q. Did you drive? A. We drove.

Q. Do you recall approximately how long it took you to get to Montana?

(Deposition of Mrs. R. G. Ryan.)

A. Well, it took us approximately three weeks because we were touring with thirteen others and conducting a geological tour.

Q. Mrs. Ryan, do you recall when you reached Montana seeing the Hargraves up there?

A. We did, we met them at Glacier National Park, quite by accident. We were parking our car and drew up behind a car that had the same license number as Dr. Hargrave's. We noticed the license plate because it was our home State license number and I compared it with the license number of his car [188] and it was his car. We left a note on the steering wheel telling them that we were also there and they later hunted us up.

Q. Did you stay at the same hotel?

A. No, I was staying at this camp ground with this group.

Q. How many days was it after you left the message in the car until they looked you up?

A. That was the same day.

Q. Who looked you up?

A. Dr. Hargrave and his wife and Ann.

Q. Of course, you were glad to see each other?

A. Yes.

Q. Later, did you and the Hargrave family have occasion to go to the same show?

A. We might have, if the doctor had been feeling up to par.

Q. Did you plan to go to anything particularly?

A. No, they were made on the spot, just ran into

(Deposition of Mrs. R. G. Ryan.)

each other quite by accident and he later looked us up at Swift Current Camp ground.

Q. On a particular evening were plans made to go out, you and the Hargraves?

A. After the Hargraves and myself met at the camp ground, they stayed a few minutes to see the set up and of [189] course the doctor was not feeling well so I said there was a motel and a nice place to eat across the road from our camp ground. They went across there and didn't know whether they were going to stay or go on, depending on how Doc felt and the accommodations that they found. We decided that it would be fun to go to the lecture held in the Many Glacier Hotel, I think, under that ranger plan. It came time to go and it was getting late and I became concerned. They had said if they decided to go on, they would mention it to me and if they did not go on, we were to go to the lecture. I became concerned when it got after supper time and I went across to the motel which I referred to previously.

Mr. Blewett: I don't mean to interrupt you, but I understood you to say something about "records" and I don't know what you are talking about.

A. I looked through my accounts—I kept track of the food for all of the group and I found my expenses at Swift Current Camp ground fell on June the 23rd and I was there June the 23rd and 24th, that I know of, before I went on.

Q. Now getting back to your concern for Dr. Hargrave, what day was that?

(Deposition of Mrs. R. G. Ryan.)

A. I think that was on June the 23rd.

Q. All right, go ahead from there, on the 23rd.

A. I went across to the Motel and asked at the desk where the Hargraves were located, if they were there, and they [190] said they were there and I went around to their cabin and Doc was in bed. Mrs. Hargrave came to the door and said it would be impossible for her to go to the lecture and that she didn't want to leave Doc to come down and tell me. I stepped inside the door and——

Q. Could you tell if they had a phone there in the lodge or not?

A. I don't know whether they did or not.

Q. Mrs. Hargrave told you that was the reason she was staying there with Dr. Hargrave, that he was in bed?

A. Yes.

Q. Did he relate to you what happened to him?

A. Yes, said that he had hurt himself on a horse.

Q. Did he say where?

A. Near Josephine Lake. I understood it was a horse trail.

Q. Was Dr. Hargrave undressed, I mean, did he have his night clothes on?

A. He was in bed. He wasn't pleased to see anyone.

Q. You observed the expression on his face?

A. He was in pain.

Q. You could tell that by observation?

A. That's right.

Q. After that, did you attend the lecture?

(Deposition of Mrs. R. G. Ryan.)

A. I did go to the lecture but I didn't come back by over there. [191]

Q. Was that the last time you saw them?

A. It was.

Q. When did you all get back to Texas?

A. It was after July 5th, I think, or the 7th.

Q. Have you had occasion to visit them here off and on, the Hargraves? A. Yes.

Q. And they visit with you? A. Yes.

Q. Confining your testimony to before June 23rd, did you have occasion to observe Dr. Hargrave coming and going from the house?

A. Yes.

Q. Is he your doctor? A. He is.

Q. Have you had occasion to observe him before June the 23rd at his office, or did you call him to see any of your family?

A. I don't think I have called him—what date are you concerned with?

Q. Before June the 23rd, before you went on the trip.

A. I did see Dr. Hargrave several days before we went on the trip. He studied my itinerary and I studied his and he took off before I did which is why I had his license number in case we did cross paths, and he was in fine condition then. [192]

Q. Well, my question is this: From all those observations prior to June the 23rd did you notice anything abnormal in the way he walked or the way he stepped, sat down and got up?

A. No, I didn't.

(Deposition of Mrs. R. G. Ryan.)

Q. Now, concerning your observations after June the 23rd, after you got back home to Texas, did you have occasion to observe him very much, going from the house?

A. Well I do know after they came back he was laid up and I think he made a trip to New Orleans concerning his back trouble.

Q. You did observe him then, quite a bit?

A. Yes.

Q. Coming and going. Was there very much of a difference in his walk and his manner of getting up and sitting down, comparing that to before, what did you observe?

A. Well, I would say there was a slight slowing down and stooping but I had no occasion to observe any other matter.

Q. You observed a slowing down and stooping?

A. Yes."

Mr. Kouri: Then there is the offering of the exhibits which will be shown to the jury later. They offered the exhibits. Now down to the question, line 23:

"Q. Prior to my meeting you today, it is the first time you ever met me? [193]

A. No, I believe not. I think I have met you on the street somewhere.

Q. Probably so, but have I ever talked to you about this case? A. No.

Q. Until today?

A. No, other than summon me here.

Mr. Kouri: "Thank you, Mrs. Ryan." And it is signed and sworn to before the notary. We would like to offer and show the Plaintiff's Exhibits #1 and #2 on this deposition.

Mr. Blewett: I think by stipulation the exhibits ought to be identified a little different.

The Court: I think whatever the next number is.

Mr. Blewett: I am willing to stipulate that the exhibits be modified by number as it appears in the deposition.

The Court: What would the next number be?

(Plaintiff's Exhibit #18 and #19 were marked for identification, being Exhibits #1 and #2 from the deposition.)

The Court: Plaintiff's Exhibits #18 and #19 are received in evidence without objection.

(Whereupon Exhibits #18 and #19 being records of Mrs. Ryan, were received into evidence.)

The Court: We will take a fifteen minute recess at this time. (Jury admonished.) Court is now in recess until 10:45. (10:30 A.M.) [194]

(Whereupon at 10:45 A.M. court was resumed, pursuant to recess, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: May we proceed.

The Court: You may proceed.

Mr. Kouri: We will call Ann Hargrave.

ANN HARGRAVE

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury.

A. Ann Hargrave.

Q. Ann, can you hold your voice up so that we can all hear you? A. Yes.

Q. Ann, where do you live?

A. I live in Wichita Falls, Texas.

Q. Are you related to the plaintiff, Dr. Hargrave? A. Yes, sir.

Q. You are his daughter? A. Yes, sir.

Q. Ann, do you recall back in the early part of June, the first part of it, I will say, about a plan for a trip you and your mother and father had talked about? A. Yes, sir, I do. [195]

Q. What about that trip, where had you planned to go?

A. We planned to go up through the Yellowstone National Park and Glacier National Park and up through Canada and back.

Q. And do you recall talking the matter of your itinerary over and such? A. Yes, I do.

Q. Were you ever present with your father and mother or both, when they discussed this with Mr. and Mrs. Ryan that lived next door?

A. Yes, sir, I remember.

Q. How long have the Ryans been neighbors?

A. I imagine about ten or eleven years.

(Testimony of Ann Hargrave.)

Q. I see. Now when you all left, you and your mother and father were on the trip? A. Yes.

Q. What kind of car did you all have?

A. We had a green Chrysler.

Q. And do you recall approximately what part of the month that you left? A. In June.

Q. Do you recall?

A. It was the latter part of June.

Q. Then you went on up north? A. Yes.

Q. Do you recall coming into Yellowstone? [196]

A. Yes, sir, I remember.

Q. Do you remember how many days it took you to get to Yellowstone? I know it has been some time ago, and your best estimate will be all right I believe.

A. I would say maybe two and a half or three days.

Q. How long did you stay at Yellowstone?

A. Not very long.

Q. Then did you go on up north?

A. Yes, sir, we did.

Q. What was the next stop, of any time? Well, if you don't recall, did you go on up into Canada?

A. Yes, we did.

Q. And in what part of Canada were you visiting?

A. We went to British Columbia and around Banff and Lake Louise.

Q. How long did you stay, approximately?

A. It was bad weather and you couldn't travel

(Testimony of Ann Hargrave.)

or see too much. I think we stayed around four days, I will say.

Q. Then after that did you all start on the way back? A. Yes, sir, we did.

Q. All right, then did you come into the Glacier National Park area? A. Yes, sir.

Q. And approximately what time during the month of June was this when you came into that particular area? [197]

A. It was the latter part.

Q. The latter part? A. Yes.

Q. Then where did you stop? Were you at Many Glacier Park area? A. Yes.

Q. And did you and your mother and father make a stop there? A. Yes, we did.

Q. Were you present with your parents when there was some message left on the steering wheel of the car? A. Yes, I was.

Q. Did you see that message?

A. I do not know if I found it or if mother did. It was from the Ryans.

Q. From the Ryans? A. Yes.

Q. And they left word they would like to see you? A. Yes.

Q. Did you go over and see them?

A. Yes, we did. We went to their camp.

Q. And how long did you spend with the Ryans there?

A. Well, at their camp we did not stay very long I don't think. We just visited with them for a little while and then we left. [198]

(Testimony of Ann Hargrave.)

Q. Then you left? A. Yes.

Q. Was there any discussion, not what anyone said, about whether or not you might stay or go on back to Texas, or do you recall that?

A. I don't recall.

Q. All right, Ann. Then after you left the Ryans there at their camp, where did you and your mother and father go? Where did you all drive to? Do you know where you went?

A. I can't remember if it was back to the motel.

Q. What time was that when you saw the Ryans? Was it in the morning or afternoon?

A. I think it was around lunch time.

Q. And then did you and your father go up to the Many Glacier Hotel? A. Yes, we did.

Q. And was your mother with you?

A. Well, she did not go with us.

Q. Did you all drive up in the car?

A. Yes.

Q. And did you park the car? A. Yes.

Q. And your mother, what did she do?

A. I do not know if she stayed in the car or whether she went to the hotel and sat down in the lobby. [199]

Q. She did not go with you and your dad?

A. No.

Q. Did you and your father get out of the car and go up to the area where they have the horses?

A. Yes, Mr. Kouri.

Q. And who did you see there?

(Testimony of Ann Hargrave.)

A. We saw Mr. Dillon about taking a little tour up to Josephine Lake.

Q. Did you know his name at the time?

A. No, I didn't.

Q. Did he introduce himself? A. Yes.

Q. He told you his name? A. Yes.

Q. What did he say? A. Blacky.

Q. He said his name was Blacky Dillon?

A. Yes, sir.

Q. You have seen him here during this trial?

A. Yes.

Q. Is that the same man that you saw?

A. Yes.

Q. Did your father introduce himself?

A. Yes.

Q. And were there inquiries made about obtaining some horses? [200]

A. Yes, there were.

Q. As you said, to go to Josephine Lake?

A. Yes.

Q. Incidentally, had you read the article in the National Geographic Magazine about that same area? Had you seen it, or do you recall?

A. Before the trip?

Q. Before the trip, yes.

A. It seems as though I heard my daddy talking something about it.

Q. Blacky then went to get the horses for you?

A. Yes.

Q. And how far away were you all from him when he went to get the mounts?

(Testimony of Ann Hargrave.)

A. Well, we were right there with him. We were close to him.

Q. Could you see very many horses there?

A. Yes.

Q. Were very many of them saddled?

A. Most of them were saddled, yes.

Q. Was there any discussion about the regular trip, and about your father telling Mr. Dillon, well, we would like to go now to take the pictures?

A. Yes, I remember that.

Q. All right, whose horse did Mr. Dillon obtain first, [201] yours or your father's or what?

A. I don't recall, sir.

Q. Did he obtain a horse for you? Did he go get a horse for you and say this is your horse, or was there some other horse brought back?

A. I don't recall, sir.

Q. You don't recall? A. No.

Q. Do you recall what color your horse was?

A. It was a brown horse.

Q. And did you mount your horse?

A. Yes, sir.

Q. You have ridden before? A. Yes.

Q. Then did Mr. Dillon mount his horse?

A. Yes.

Q. And your father? A. Yes.

Q. And so you all then rode on toward the trail, is that right? A. Yes, sir.

Q. Who was in the lead? A. Mr. Dillon.

Q. Who was next? A. I was. [202]

Q. And who after you? A. My father.

(Testimony of Ann Hargrave.)

Q. Now that area leaving there from the hitching post, is the road wider there?

A. Yes, sir, I believe it was.

Q. And then later you came to what, foliage?

A. Yes, sir, it was quite thick in there. It was just like a forest with trees.

Q. My question is, about how much in distance would you say, your estimate, it was from the hitching post to where you began to see foliage and trees and forest?

A. Oh, I would say it was about one-fourth of the way.

Q. I see. The whole distance to it would you estimate was about how far, if you recall? To the lake I mean?

A. Oh, I would say maybe a mile and a half, I couldn't really say.

Q. All right. So you all went on, and what pace were you all going?

A. We were walking very very slowly.

Q. How far apart were you, the horses?

A. Well, it varied. Sometimes Mr. Dillon would be a little bit in front of me and then I would move up a little bit and then daddy would be a little further behind. I believe he was always a little further behind, but it would vary between Mr. Dillon and myself. [203]

Q. Did Dillon tell you before you left that his horse was to be the lead horse and you all were to stay behind, or was anything said about that?

(Testimony of Ann Hargrave.)

Mr. Blewett: I object to a leading question like that.

Mr. Kouri: I will withdraw that.

The Court: I think that is true of all the preliminaries, the leading questions were proper, but if you will not now.

Mr. Kouri: Thank you, sir.

Q. Did Mr. Dillon state anything to you before you left in the way of giving you any instructions?

A. No, sir, I don't remember.

Q. Going on up the trip, did anything unusual happen going up with reference to your father?

A. Yes, sir, he dropped a little package of his film.

Q. And how far in front were you ahead of him, or were you to the side of him, or what? In other words, how did you know about it?

A. I believe he said something about it.

Q. Where were you? What was your position then? Who was in front of whom?

A. Mr. Dillon was always in the lead.

Q. With reference to you and your father?

A. I was second and my father was last. [204]

Q. The film was dropped and what did you do?

A. I got off my horse and picked it up and gave it to him.

Q. Did you have any difficulty?

A. No, sir, I didn't.

Q. What did you do after you picked it up and gave it to him?

A. Well, we started.

Q. And continued on?

A. Yes, sir.

(Testimony of Ann Hargrave.)

Q. Without any other incident until you got to the lake? A. Yes, sir.

Q. All right, we are at the lake. Of course, were you enjoying the scenery and everything?

A. Yes, sir.

Q. It was quite beautiful, wasn't it?

A. Yes, sir.

Q. Now, Ann, when you got to the lake what did you do then? Did you all stop?

A. Yes, we stopped for around I would say maybe fifteen or twenty minutes.

Q. Do you recall whether you got off your mount or not? A. I don't remember.

Q. Do you recall anything about what your father did with the camera? [205]

A. Yes, he took some pictures I think, maybe two pictures of me on my horse at the lake.

Q. I see. And did you see your father talking to Mr. Dillon?

A. No, sir, because I rode around a little on my horse.

Q. You rode around? A. Yes.

Q. State whether or not they, Dr. Hargrave and Mr. Dillon, remained together or not?

A. Yes, they did. They stayed at the lake.

Q. And approximately what time was this, Ann, to the best of your recollection?

A. Well, I would say maybe between 11:30 and 12:30.

Q. Something like that? A. Yes.

(Testimony of Ann Hargrave.)

Q. You stayed there how many minutes, approximately? A. Maybe fifteen or twenty.

Q. Then who said something about well, let's go back, or let's return back, or did anyone say anything about let's go back, that you know of?

A. No, sir, I don't remember.

Q. Were you present then when your father attempted to mount his horse?

A. Yes, I was, and I believe he had a little trouble getting on it. [206]

Q. Please describe in your own words what you observed?

A. Well, I don't remember it too much, but he did have a little trouble, and I think the saddle slipped a little bit and Mr. Dillon had to push it back up and help him on his horse.

Q. Did Mr. Dillon do anything with reference to the cinch or taking it up, tightening it up? Did he do anything?

A. It seems as though he did, but I couldn't say for sure.

Q. State whether or not you saw your father at that moment, that particular occasion grabbing onto the horse's mane to help get on while Mr. Dillon was helping him, if you recall?

A. It seems as though he did. I know he grabbed hold of the saddle horn.

Q. Then you all started back? A. Yes.

Q. And how did you start off going back?

A. Mr. Dillon was in the lead, I was second, and my father last.

(Testimony of Ann Hargrave.)

Q. Now going back just a little Ann, would you tell us was that trail where you got into there where it narrowed, was there lots of foliage and trees and bushes?

A. Yes, sir, there were.

Q. How wide was it when it narrowed down, would you say? [207]

A. Well, I think the narrowest parts the horses could go through it all right.

Q. One at a time? A. Yes.

Q. Were there any turns in the trail?

A. Yes, sir, there were. I would say maybe around three. There may have been more, but I am sure there were three.

Q. Going up that way did Mr. Dillon ever get out of your sight by say one of the bends at any time? Of course, I know you were second?

A. Yes, sir, he did because we varied on our distances.

Q. All right, we will get back to our trip coming back. You started off at a slow pace?

A. Yes.

Q. How long did that continue?

A. You mean slowly, sir?

Q. Yes, in the distance of feet or the portion of the way, would you say you went one-eighth of the way or one-fourth of the way going slow, or what?

A. During the little foliage maybe we went about half the way or three-fourths of the way in the little forest we went through.

(Testimony of Ann Hargrave.)

Q. Coming back could you observe on your left where the foliage was and trees and bushes and things, the greenery [208] were you observing on the right and left? A. Yes, sir.

Q. This is coming back. Could you see anything to your right or was it obstructed by something?

A. To the right was all trees.

Q. What about to the left?

A. Well, to the left every once in a while there would be a little clearing where the sun would come through, and a little place where you could see the lake and the mountains back there.

Q. Would it be wide enough a person could stop and get a view? A. Oh, yes.

Q. I see. So you were all coming along. Do you know whether or not your father, either going slow or stopping the horse or anything, took the last picture on the trip back? Do you know whether he did or not? A. No, I don't.

Q. But he remained in the back even going up and coming back all the way?

A. Yes, he did.

Q. All right now, Ann, confining your testimony to the time you all got—you said you went about three-fourths of the way at this particular point, were you riding in the proximity or nearness to Mr. Dillon? I mean were you not close to him?

A. I think there was about the distance [209] of a horse between us at that time.

Q. Did you look back to see how far back your father was? A. No, sir.

(Testimony of Ann Hargrave.)

Mr. Blewett: At what point is this that you asked her about how far?

Q. Ann, do I understand about three-fourths of the way you all had come to what I am going into with you next, is that right?

A. No, sir, you see it was just a little forest about half the way or maybe three-fourths of the way back from the distance, from the hitching post to the lake itself. I stated we had come around three-fourths of the way through the foliage.

Q. Through the foliage?

A. Yes, sir—not back to the stables.

Q. But now did you look back—as you came to up Mr. Dillon did you look back to see if you could see your father? A. No, sir.

Q. Had you looked back on occasions to see if you could see him, and had your view been obstructed on the turns?

Mr. Blewett: Your Honor, again it is leading.

The Court: Objection sustained. I think you should divide that question, Mr. Kouri.

Q. Ann, state whether or not you ever looked back looking for your father on the way back from the lake? [210] A. Yes, sir.

Q. State whether or not you ever, at the turn area, ever looked back? Did you occasionally look back?

A. Yes, I believe I did once. And I waited for him until he got up with me.

Q. In other words, did you see him?

A. No, I didn't.

(Testimony of Ann Hargrave.)

Q. All right, thank you. All right, did you then come up, ride up then coming toward the latter part of the trip back, come up and say anything to Mr. Dillon?

A. Yes, sir, we were going very slowly.

Q. Where were you at this point, if you recall?

A. Well, we were almost——

Q. Were you on a straight away? Were you on a straight away part of the trail, or do you remember?

A. I don't remember if we were, but we were almost out of the forest. We weren't quite out of it yet.

Q. How did you ride up toward Mr. Dillon's mount? A. I did not ride up, sir.

Q. Where were you in reference to his horse?

A. About the distance of maybe a horse or two horses between us.

Q. I think you told me a while ago. I had forgotten. What did you say?

A. I asked him if we could go just a little faster. [211]

Q. State whether or not you had observed his attire with reference to his shoes or boots, what he had on?

A. Well, he had on boots. He had on spurs.

Q. That is fine, thank you. When you said that, what did he say, if anything?

A. Sir, he did not say anything.

Q. What did he do?

(Testimony of Ann Hargrave.)

A. Well, we waited for just a short pause and then the horses just charged off.

Q. Whose horse charged off first?

A. Mr. Dillon's.

Q. Then what did your horse do?

A. Charged off, went into a full gallop.

Q. Did you spur your horse? You did not have spurs on did you? A. No, sir.

Q. Did you kick your horse?

A. No, sir, I did not do anything to him.

Q. So as you described it when he started his, then yours started?

A. Yes, it just charged off.

Q. All right, what kind of run was it, if you know? A. Well, it was a full gallop.

Q. A full gallop? A. Yes. [212]

Q. All right, describe it from there on. What happened then?

A. Well, we were going so fast that my vision was blurred. I couldn't see anything in front of me and it frightened me. I yelled to stop. I heard my father yell at that time. He was yelling whoa. It frightened me. I called to Mr. Dillon to stop again. In a few minutes, I imagine I had run about a block, he stopped his horse and mine stopped also, and I turned my horse around and I saw my father's horse just galloping full gallop toward us.

Q. How was your father moving as you were there, as he was galloping toward you?

A. When he stopped he was leaning off the side.

(Testimony of Ann Hargrave.)

Q. Before he stopped how was he going, coming toward you?

A. I couldn't see him. It was going too fast.

Q. Then his horse came up and stopped?

A. Yes.

Q. Go ahead?

A. After his horse stopped I could tell, he was leaning off the side of his saddle, over the right side of his saddle.

Q. Who?

A. My father was leaning over the side of his saddle; and Mr. Dillon and I turned around and went over to him. You could tell he was in pain. He had his hand on his back. [213] He was in pain. You could tell by the expression on his face. He was hurting very badly.

Q. How much was the saddle off?

Mr. Blewett: That is a leading question again, unless I missed something.

The Court: What was the question?

Mr. Kouri: I said how much was the saddle off?

The Court: She testified to that. Overruled. You may answer the question.

Q. Ann, a while ago did you say something about the saddle?

A. Yes, sir, I did. I said that the saddle was leaning over to the right side.

Q. Now my question, about how much approximately?

A. Well, the horse would be about like that (in-

(Testimony of Ann Hargrave.)

dicating with hands). He was leaning over a good distance.

Q. I see. Did Mr. Dillon do anything?

A. Yes, he stopped. We both stopped our horses. He had to push the saddle over and straighten it.

Q. Did he do anything with reference to the cinch at that time, if you remember?

A. It seems as though he had to tighten it, but I am not for sure.

Q. All right, thank you. All right, Ann, go ahead and relate the relevant matters you heard between your father and [214] Mr. Dillon, as to what you heard and what you all did going on back?

A. Well, I don't remember the exact words, but Mr. Dillon after he saw my father, he seemed rather disgusted about it, that he was leaning over the horse and that his back was hurt. He was just rather perturbed about the idea, and then after we——

Mr. Blewett: Wait just a minute, Ann, if you will please. I believe I would rather have the counsel ask her a question from time to time so that I will know what is coming.

Mr. Kouri: I thought it would save the objections on leading.

Q. All right, Ann, then I believe you said you observed your father? A. Yes.

Q. I believe you described that. Was anything said about your father getting off the horse, what your father said?

A. Well, I do not know, I think he was rather

(Testimony of Ann Hargrave.)

doubtful about riding the horse back and he wanted to get off, but he couldn't do anything. He couldn't move. He was just in pain.

Q. Did he get off?

A. No, sir, he couldn't.

Q. How long would you say you stayed in that area that time? [215]

A. I imagine we stayed around ten minutes, by the time Mr. Dillon adjusted the saddle.

Q. Ann, how far was it from that point back to the hitching post, your best estimate? I know it has been a long time?

A. I imagine we had come I would say three-fifths of the way back.

Q. About three-fifths of the way back?

A. Yes.

Q. Then what did you all do when you were all ready? Did you ever get off your horse?

A. Yes, sir, I think I did.

Q. I see. All right, did you mount then, you and Blacky, Mr. Dillon? A. Yes, we did.

Q. Then did you all come back in to the hitching post?

A. Yes, slowly we came back to the hitching post.

Q. Was anything said then by Mr. Dillon on the way back, did he say anything else?

A. I don't recall.

Q. Did you all then get to the hitching post?

A. Yes, we did.

(Testimony of Ann Hargrave.)

Q. And do you remember who got off first or not?

A. Well, I do not know if it was Blacky or myself, because I could get off my horse easily. [216]

Q. And who paid for the trip?

A. My father did.

Q. Do you know how much?

A. I think it was four dollars, or around four dollars.

Q. I see. Do you recall then approximately about what time it was then, Ann?

A. Well, I will say maybe one or one-thirty.

Q. I see. Ann, when the gallop started there, after you related that Mr. Dillon started off at a gallop there, then were you in a position to see Mr. Dillon?

A. You mean while we were galloping?

Q. No, just before you started into the gallop did you see him? A. Yes, I saw him.

Q. After you had made that request did you see whether he looked back any to take a look back toward where your father was?

A. No, sir, he didn't.

Q. Did he make any utterance about we are going to go into a gallop?

A. No, sir, he did not say anything.

Q. Did he say anything to you we are going into this gallop? A. No, Mr. Kouri.

Q. You started out then. With reference to the horses, [217] both yours and Mr. Dillon's, was

(Testimony of Ann Hargrave.)

there any noise made when you were going on this gallop?

A. Yes, the hoofs beating against this ground.

Q. Were they light or medium, or did they make quite a sound?

A. They were heavy, very heavy.

Q. And did that continue, that noise of the horses' hoofs on the turf or the ground there, did that continue on for that whole block?

A. Yes, sir, it did. We were really going.

Q. All right, then, after you all left the place there, where did you and your father go?

A. We went back to the car.

Q. Was your mother there?

A. Yes, she was.

Q. You all started back for Texas?

A. No, we went to a motel.

Q. Oh, yes. What happened there?

A. Well, I believe that we were supposed to go with the Ryans to a lecture that evening. We had planned—we had made arrangements before when we saw them, and we were going to go, but daddy's back, he was in pain and he went to bed immediately when we went to the motel and stayed there.

Q. When your first saw your mother, did your father make any remark to your mother without her asking him? About anything having happened with regard to his back? Do you understand? [218]

A. Yes, sir.

Q. Did your father say anything voluntarily to

(Testimony of Ann Hargrave.)

your mother when he first saw her there at the car about what had happened? A. Yes, he did.

Q. In substance what did he say?

A. Well, I do not know if he said we are going to have to get a motel, or I am 'going to have to lie down, or something because my back is hurting.

Q. Did he say how he hurt it?

A. I don't recall, sir.

Q. All right, Ann. Now how long did you all stay at the motel?

A. We stayed that evening, that afternoon and that evening, and the next day, and I don't recall if we stayed longer or not.

Q. Did your father make the lecture that night, or did he stay in bed?

A. No, sir, he couldn't. He was unable to go.

Q. What about the next day? Was he able to get up all right?

A. Well, very little I think.

Q. And then later on you all started on back to Texas? A. Yes.

Q. How old were you then? [219]

A. Let's see. I must have been thirteen or fourteen, I don't recall.

Q. Did your mother do anything for your father on the way back to Texas?

A. Yes, sir, she had to put a pillow in back of his back and put her arm there and brace it up a little bit and try to make him as comfortable as he could be on the seat.

(Testimony of Ann Hargrave.)

Q. Did he on the way back stop at some place to get something?

A. Yes, I believe it was in Colorado he stopped and he got a little piece of board to put in back of his back when he was driving.

Q. And then how long did it take you all to come back, approximately?

A. Oh, we had a hard time. It must have taken a week I think to come back.

Q. Ann, you have made trips with your parents before this trip, haven't you? A. Yes.

Q. Extended trips? A. Yes.

Q. Tell the jury whether or not you had ever seen your mother administer aid and attempt to comfort your dad like she did on this trip going back to Texas?

Mr. Blewett: Wait a minute. Your Honor, [220] I think that is an improper question. It is incompetent, irrelevant and immaterial. It doesn't show that the circumstances were similar or the same or what treatment or comfort she might have rendered or what he means by treatment or comfort.

The Court: Objection sustained.

Q. Ann, basing it on your observation, and comparing it on this trip going back to Texas and other trips, just based on your observation, did you ever see your mother put a pillow behind your father's back; that is, like she did on this trip, and the sweater and a board? A. No, sir.

Q. When you all got home, what happened then?

A. Well, I think when we got home, well, daddy

(Testimony of Ann Hargrave.)

couldn't sleep at night or anything, and he had to get a board and put it down on the floor and sleep on the floor. He was uncomfortable in bed.

Q. You observed him all that time?

A. Yes.

Q. Was he able to go down to the office for the first two weeks or more?

A. No, sir, I think he stayed at home most of the time.

Q. Now, Ann, confining your testimony before June 23, 1956, did you have an opportunity to observe your father day and night outside of the time he was at the office? Observe his walk? [221]

A. Before the accident?

Q. Before the injury? A. Yes, I did.

Q. Describe to the jury in a very brief way what you observed from the way he walked and got around and such before June 23, 1956?

A. Well, he would move around easier, and he was always moving around.

Q. Did you ever hear him complain any about how he has been complaining since this injury?

A. Oh, never. No, never.

Q. In comparison to that observation, now your observation after you all got home, compare the way you have observed him? Compare the way he appeared and walked and everything after June 23rd to the time before June 23rd?

A. Well, he is slower. He slowed up and everything, and he usually goes to bed very early at night.

(Testimony of Ann Hargrave.)

Q. When would he go to bed before the injury approximately, on the average?

A. Maybe ten or ten thirty or eleven, I don't recall.

Q. Did your mother and father have guests and go out before the injury? A. Yes, sir.

Q. Have they any since that time?

A. Well, they haven't too much. Around that time of [222] the evening he gets tired and usually goes to bed early.

Q. What time does he go to bed now, approximately?

A. Very early, sometimes seven or seven-thirty or eight.

Q. Do you know whether or not he comes home earlier from the office now than he used to?

A. Yes, sir, it seems as though he does. He comes home around half an hour or maybe an hour earlier.

Q. What does he do when he comes home from the office that is different from what you have observed before the injury the 23rd of June, 1956?

A. Well, he is usually very tired, and he usually just sits down or maybe sometimes he will rest for a while.

Mr. Kouri: That is all. You may have the witness, Mr. Blewett.

Cross Examination

Q. (By Mr. Blewett): Ann, do you have a recollection now as to the point on this trail where

(Testimony of Ann Hargrave.)

your dad caught up with you and Blacky Dillon and the three of you stopped? Do you have any recollection as to the trail or any road or anything there, Ann?

A. Do you mean the distance from——

Q. No, I will put it this way, Ann. Can you describe to me generally what the condition of the area was there where you say your dad and Mr. Dillon and you were stopped, just before you went back to the hitching post? [223]

A. Well, it was rather level there, and it was clear. We had come out of it then. It was clear there.

Q. Do you have any recollection as to whether or not the trail at that point branched off the road, the trail to the hitching post branched away from the road which theretofore had formed part of the trail? Do you understand my question, Ann?

A. Well, I don't recall. You mean if there was a road branching off from the trail that we had come up on?

Q. Yes.

A. It seems as though there was a road around there, but I couldn't say.

Q. And the trail branched off to the right, did it, to go to the hitching post?

A. No, sir, I think it went to the left.

Q. The trail? A. Yes.

Q. This trail that you defined, would you say whether or not it was wide enough for a horse and wagon in most places?

(Testimony of Ann Hargrave.)

A. Not in most places.

Q. Well, the trail from the hitching post up to Lake Josephine, the one I have in mind, your recollection is it would not be wide enough for a horse and wagon?

A. In the clear parts I am sure it would be, but after about half way it was narrow and trees had grown in. [224]

Q. Your testimony is that where the horses ran you were in the clear, weren't you?

A. It was rather clear around there. On the right side we always had trees. On the left side it broke out a little bit and it was clear on the left side and it was on the right. I believe we were still maybe in the forest, what I call the forest, when I had asked Mr. Dillon to go just a little faster.

Q. Then your testimony is he waited a few minutes and then ran? A. Yes.

Q. Do you recall, Ann, whether you were in the clear to your left when the horses started to run? Do you understand my question?

A. Yes, sir, I do. I am trying to think. It seems as though we were still in when we started running, when we started galloping, we were still in the thicket there when we started, and when we stopped we were out in the open.

Q. And it is your recollection that at the point where you stopped, the trail broke away from the road?

A. I couldn't say, sir. I am not certain of that.

(Testimony of Ann Hargrave.)

Q. Is that your best recollection of that at this time, Ann?

A. About the trail you mean, and the road?

Q. Yes?

A. I couldn't say. I don't recall. [225]

Q. Ann, I believe on your testimony you did testify that at certain points along this trail between the time you left and got to the lake and returned, there were points where there were curves and you couldn't see ahead, you couldn't see Mr. Dillon?

A. Yes, sir.

Q. And I think you said there were times you looked back and couldn't see your dad?

A. I believe. I did not look back very often, but one time I remember he was out of my sight.

Q. One time?

A. I couldn't say for certain.

Q. Well, this point where you stopped on the way back, could you at one point see the hotel or the riding stables?

A. No, sir.

Q. Directing your attention to a question I asked you in your home, Ann, on January 5th, do you remember my taking your deposition?

A. Yes, sir.

Q. I asked you a question, "Was your dad ever out of your view when you looked back?" and do you remember the answer you gave at that time?

A. No, sir.

Q. Your answer was, "I don't remember."

A. Well, sir, after this deposition was taken I remembered a few things I hadn't before. [226]

(Testimony of Ann Hargrave.)

Q. All right, Ann. Ann, what is your best estimate as to the distance your father was behind you when you first saw his horse running?

A. After we had stopped and I first saw his horse running?

Q. Well, whether you had stopped or not, when you first saw your dad's horse running, how far behind you was your dad then?

A. We had stopped then. It was about I would say the distance to the end of the court room, or maybe further.

Q. From where you are now to the end of the court room?

A. Yes, sir.

Q. And you were stopped at that time?

A. Yes, sir.

Q. At the time I was at your home, Ann, I asked you a question as follows: "And what then, after you asked Blacky to make the horses go a little bit faster, did he do?" You answered: "Well, he waited for a few minutes and then he just took off and started running." My next question was: "Did he look back, or anything?" Do you know what your answer was?

A. Did he look back?

Q. What was your answer to that question, do you know?

A. No, sir.

Q. Your answer in that deposition was, "I don't remember." Now your testimony is that he didn't look back, isn't it? [227]

A. Yes, it is, but may I explain that, sir?

Q. You sure can.

A. You know I told you before I was a little

(Testimony of Ann Hargrave.)

nervous that first time you asked me all those questions, and when you finished I remembered a few things more than I had before you asked me those, before you had asked me those.

Q. Ann, are you nervous today?

A. Yes, sir.

Q. You are a little nervous now?

A. Yes, sir.

Q. Did you know I was coming all the way down to Texas to come to take your deposition? Didn't you know you were going to give me your deposition? Didn't your daddy's attorney tell you that?

A. I don't recall, sir.

Q. You were present and available for that purpose, weren't you, Ann?

A. Yes, but it was only natural for me to be a little nervous I think.

Q. Ann, did you by any chance see your dad taking any of the pictures on this trail on the way back?

A. Yes, sir.

Q. Do you know, were you able to see him take the last picture that he took?

A. I did not see him taking it, if that is what you are asking. [228]

Q. You did not see him? A. No.

Q. When did you first know that he had taken the last picture that he had taken on that particular trip?

A. Well, I imagine after he had gotten them developed and we saw them.

Mr. Blewett: I believe that is all.

Mr. Kouri: I believe that is all, Ann. Thank you.

A. You are welcome.

(Witness excused.)

Mr. Kouri: Your Honor, our next witness will be the lengthy deposition of Dr. Van Deventer. Could we recess at this time, or would the Court care to go on?

The Court: We will recess now. We will recess until 1:30. Court will be in recess until 1:30. (Jury admonished.) Court is now in recess. (11:40 a.m.)

(Whereupon at 1:30 p.m. court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Mr. Kouri: Your Honor, at this time we would like to offer briefly the life expectancy of the plaintiff. Would you care to see this, as to what an actuary stipulated to?

Mr. Blewett: I have no objection to the competency of the table as to the American Standard, and they say it is your Honor. We will enter an objection to the introduction at this time because there is no evidence that warrants its introduction.

The Court: I will receive it subject to motion to strike if it is not connected up.

Mr. Kouri: Very well then we will reserve it if we may.

The Court: Either that or I will receive it subject to motion to strike. You may have it marked.

(At this time Plaintiff's Exhibit #20, being an American Table of Mortality, was marked and received into evidence.)

Mr. Kouri: Your Honor, at this time we would like to offer the deposition of Dr. Loyd R. Van Deventer, of Wichita Falls, Texas. Mr. Bretz will answer the questions. Ladies and gentlemen, this deposition we are offering of Dr. Loyd Van Deventer was taken at Wichita Falls, the 5th of January, 1959, [230] before a Notary Public and official court reporter, and I will ask the questions and Mr. Bretz will give the answers.

Mr. Blewett: Mr. Kouri, at this time, and in order to save some time, as we go through this it is understood in spite of what the notary public asserted in the front as to the stipulation, it is subject to all objections.

Mr. Kouri: Yes, your Honor, and if it is all right with both parties as we come to a question that might be objectionable I will not ask it if you like.

The Court: It occurs to me it might save time if it is done in that way. Then if there are any questions we can consider them in the absence of the jury.

Mr. Kouri: All right, sir. This is the deposition of Dr. Loyd R. Van Deventer in this case, direct examination by me.

DEPOSITION OF
DR. LOYD R. VAN DEVENTER

(Reading from deposition:)

“Q. Please state your name to the court and jury. A. Loyd R. Van Deventer.

Q. What is your profession?

A. I am a doctor.

Q. Medical doctor? A. Yes.

Q. Where do you live?

A. I live at 2006 Avondale, Wichita Falls.

Q. How long have you lived here, Dr. Van Deventer? [231]

A. I have lived in the city seven years.

Q. How long have you practiced medicine in Wichita Falls, medicine and surgery?

A. I practiced two years in the Air Force and five years in the city, private practice.

Q. Do you maintain your own clinic in this city?

A. Yes, sir.

Q. What medical school are you a graduate of?

A. I graduated at the University of Oklahoma.

Q. Did you receive a medical degree from that university? A. I did.

Q. In what year, Doctor? A. 1947.

Q. Thereafter, did you go into a period of internship? A. Yes.

Q. Where?

A. At the Henry Ford Hospital, Detroit, Michigan.

Q. For how long, Doctor?

(Deposition of Dr. Loyd R. Van Deventer.)

A. For one year and after that I was a resident in orthopedic surgery at the University of Oklahoma Hospital from 1948 to 1951.

Q. And after that time?

A. After that I was Assistant Chief of Orthopedic Surgery at Sheppard Air Force Base from 1951 to 1953.

Q. Then did you open your own clinic? [232]

A. Then I opened my practice in Wichita Falls.

Q. Are you a duly licensed physician and surgeon? A. I am.

Q. Having been licensed by the Medical Board of the State of Texas? A. Yes.

Q. Is your license duly recorded in Wichita County, Texas at the Clerk's office? A. It is.

Q. What honorary societies are you a member of?

A. I am a member of the American Board of Orthopedic Surgeons, and the American Academy of Orthopedic Surgeons.

Q. Are you a member of the Wichita County Medical Society? A. Yes.

Q. And the State Society?

A. Yes and also the American Medical Association.

Q. Do you specialize in any particular field of medicine? A. Orthopedic surgery.

Q. Tell us briefly what the term, orthopedic surgery entails?

A. Orthopedic surgery is that specialty which deals with diseases or conditions affecting the loco-

(Deposition of Dr. Loyd R. Van Deventer.)

motor apparatus of the body, the apparatus which moves parts of the body.

Q. In other words, it is the bones and joints, bone and joint surgery? [233]

A. Bones, joints and muscles.

Q. You have specialized in that particular field for how long, how many years?

A. Seven years in practice and three years in post-graduate work.

Q. Dr. Van Deventer, do you know the plaintiff, Dr. Robert L. Hargrave? A. Yes.

Q. How long have you know him?

A. I've known Dr. Hargrave five years.

Q. He is a practicing physician and surgeon in this city? A. Yes, sir.

Q. Did you have occasion to examine Dr. Hargrave any time the past few weeks or months?

A. I have.

Q. Did he make an appointment to come by and see you? A. Yes, sir.

Q. Did you have any business dealings with him before? A. Yes, sir.

Q. In connection with the practice of medicine and surgery? A. Yes.

Q. Anything other than that?

A. No, sir. [234]

Q. On few or many occasions?

A. You mean, practicing together?

Q. Consultations together.

A. I would say on a few occasions.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. You have your records and notes there in front of you, in your file? A. I do.

Q. What date did you first examine Dr. Hargrave? A. September 8, 1958.

Q. Here in your clinic? A. Yes, sir.

Q. Did he have some X-rays with him?

A. He did.

Q. How many, if you recall?

A. I don't recall the number, a rather large number which extended from July 1956 to about the middle of 1958.

Q. Do you have all of those X-rays here on your desk? A. I do, yes, sir.

Q. Do the X-rays show markings or reveal who took the X-rays? A. Yes, sir.

Q. What doctor did you learn from the markings took the X-rays?

A. The first films were made at the Bethania Hospital.

Q. Here in this city? [235]

A. In this city. And the next series of films were made at New Orelans. The second films were made in New Orleans by Dr. Ane.

Q. Were any made by Dr. Wickstrom of New Orleans?

A. I know that Dr. Wickstrom saw him. I didn't see any films that would identify specifically that they were made by him.

Q. Did you take any X-rays of the plaintiff, Dr. Hargrave? A. I did.

Q. And do you have them in your possession?

(Deposition of Dr. Loyd R. Van Deventer.)

A. Yes, sir.

Q. Were they taken under your direction and supervision? A. They were.

Q. How many did you take?

A. I believe there were three.

Q. What did they consist of?

A. They consisted of film of the dorsal spine, two films of the dorsal spine and two films of the lumbar spine.

Q. Would you please get those films and let the reporter mark them, please?

A. This is one of the first films, made by Bethania.

Mr. Kouri: We offer them in evidence as Plaintiff's Exhibits Nos. 1, 2, 3 and 4."

Mr. Blewett: Just for the record here, again I think those exhibits, the X-rays identified as 1, 2, 3 and 4 should carry a consecutive number here.

The Court: Could we identify them now? [236]

Mr. Kouri: Yes, that should be done, your Honor.

The Court: Let the record show that in the testimony of Dr. Van Deventer in his deposition that Plaintiff's Exhibit #1 is now Plaintiff's Exhibit #21; Plaintiff's Exhibit #2 is now Plaintiff's Exhibit #22; Plaintiff's Exhibit #3 now #23 and #4 is now #24. That will identify them for the record.

(Whereupon Plaintiff's Exhibits #21, #22, #23, and #24 being X-rays were admitted into evidence.)

(Mr. Kouri resumes reading of deposition.)

(Deposition of Dr. Loyd R. Van Deventer.)

“Q. Now, Dr. Van Deventer, on how many occasions did you examine Dr. Hargrave?

A. On two occasions.

Q. When was the last time that you examined him? A. October 7, 1958.

Q. Did you see him this past week?

A. Yes, sir.

Q. Did you make an examination of some sort this past week?

A. No, sir, we just went over all of these X-rays.

Q. When was that, last Saturday?

A. Saturday, yes.

Q. Now, on your first examination, Dr. Van Deventer, and after making your X-rays, what were your findings? [237]

A. Well, first of all his films revealed a compression fracture of the vertebral body of T-10, the tenth dorsal vertebrae.

Q. What were your other findings in connection with your examination of Dr. Hargrave?

A. Well, actually, from a physical standpoint, he shows very little physical findings. The major finding is by virtue of these X-rays and by virtue of his history.

Q. Was that a compression fracture that you noticed?

A. Yes, it was a compression fracture.

Q. Of that dorsal number 10?

A. That's right.

Q. Did he relate to you a history of his injury?

A. Yes, sir.”

(Deposition of Dr. Loyd R. Van Deventer.)

Mr. Kouri: Your Honor, on line 8 I will let the Court pass on the merits of that objection.

(At this time there was discussion between court and counsel outside the hearing of the jury.)

Mr. Kouri: Page 12, line 1.

Mr. Blewett: Your Honor, the objection would carry through because it is related to the same thing. It is related to the history. It is hard for you to judge.

The Court: I don't have it here.

(Whereupon there was further discussion at the bench outside the hearing of the jury.)

Mr. Blewett: Go ahead, we will try to speed it up. [238]

The Court: You go ahead with that question.

(Mr. Kouri resumes reading of deposition.)

"Q. In other words, do you have an opinion as to whether or not this condition was caused by trauma? A. I believe it was.

Q. In your opinion?

A. In my opinion.

Q. And trauma means what?

A. Trauma means an injury.

Q. Of course, on your testimony that you have given us already and what you will give as I ask you these questions, you are not basing any opinion that you are going to give on the history, are you? In other words, it is going to be due to the findings that you have made?

A. That's right.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. Now, did you examine X-rays that were made by Dr. Ane and the ones made by the Bethania Hospital? A. Yes, sir.

Q. And did you note anything unusual about the X-rays with reference to Dorsal Number 10, in those other X-rays that you examined?

A. Yes, first of all, the films made at Bethania Hospital were not as good quality, actually, as the ones that were made later in New Orleans. However, all the films reveal compression [239] of the vertebral body of T-10 approximately one-third, as compared to the adjacent vertebrae.

Q. Please get the X-rays that show the pronounced fracture and put it on the shadow box, Doctor. I want that other one, that small one that had the red markings on it. We will get the other one later. Now this X-ray that was made by Dr. Ane on the right here, on the shadow box, please point out in that X-ray where you found any abnormality."

Mr. Blewett: I think, if Mr. Kouri doesn't mind, it is not going to make too much sense to refer to these X-rays. I am willing to say what Dr. Van Deventer is referring to is generally what was reflected in the testimony coming so far as his condition is concerned.

Mr. Kouri: We will waive presenting it to save time.

The Court: I don't think it will make much sense to the jury if they don't have the X-rays.

Mr. Blewett: The only thing, in making this

(Deposition of Dr. Loyd R. Van Deventer.)

waiver or concession at this time, I don't necessarily adopt the Doctor's findings. I am just waiving that we should refer to each X-ray each time he makes reference to it, and I will concede that the photographs in general show the condition that was observed in the view box this morning. Are these films in evidence we are talking about?

Mr. Kouri: They are, yes, sir. We might add three of them. We have just got 5, so 6 will be 26 and 7 will be 27. #5 will be #25. [240]

The Court: I see, you have three more.

Mr. Kouri: Yes, sir.

The Court: That will be 25, 26 and 27.

(Whereupon Plaintiff's Exhibits 25, 26 and 27, being X-rays, were received into evidence.)

(Deposition continued.)

"A. First, on the film on my left, P-25 Exhibit, is a lateral X-ray, an X-ray made from the side, of the lower dorsal spine, which reveals a compression of the front portion of the 10th dorsal vertebra, and interruption of the cortex of this vertebra, inferiorly, P-26, which is an oblique film, taken from a slight angle of the same area, reveals a definite interruption of the inferior cortex of T-10.

Q. Can you see from the Exhibit No. 26 the fracture line in the vertebra?

A. Yes. Here is the fracture line, here, by the interruption of this cortex. This cortex being perfectly smooth, we see here the offset.

Q. In what part of it, sir?

(Deposition of Dr. Loyd R. Van Deventer.)

A. The inferior. In the inferior. That would be down toward the feet, the bottom, so called, of T-10.

Q. Now will you put that other one that we had on the shadow box, P-27. You have placed Plaintiff's Exhibit No. 27 in the shadow box?

A. P-27 is a lateral or a side view of the dorsal spine [241] which was made at Bethania Hospital. This film, as we commented before, does not show the details and is not technically as good a film as P-25 or P-26, however, it does reveal the compression of the vertebral body of T-10 compared to the adjacent vertebra. These measurements have been recorded by the radiologist and they are written clearly on the film, 26, 26, 28, 30 and T-10, 22."

The Clerk: They say they don't have 6 and 7. So before we get any further we had better find out where 26 and 27 are.

The Court: 26 and 27, we had better get those identified. Which is it, Doctor, 6 in the deposition was which one this morning? What is that?

Mr. Kouri: 15 and 26 are the same then, Judge.

The Court: Let the record show that the reference in the deposition to Plaintiff's Exhibit 6 has been received in evidence as Plaintiff's 15. And what about 7?

Mr. Kouri: That is 16.

The Court: Let the record show that X-ray referred to in the deposition as #7 has been received in evidence as #16.

(Continuing to read:)

"Q. Twenty-two what?

A. Millimeters.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. What is significant and what is your opinion [242] in regard to the width of T-10 amount to only around 22 millimeters?

A. Well, the vertebra has been squashed, so to speak or compressed, so we refer to its technically.

Mr. Qouri: Line 25.

Q. Dr. Vandeventer, what is your opinion in regard to that condition existing as you found it in this X-ray of the vertebral column, especially in regard to T-10?

A. It is my opinion that when the adjacent vertebrae in a spine are considerably larger by measurement than a single affected vertebra, then that vertebra has been compressed by injury at some time.

Q. With reference to any congenital conditions, would you please tell us whether you have an opinion on that?

A. It is my opinion that in a congenital condition several vertebrae, probably all of the dorsal vertebrae would be more or less equally compressed.

Mr. Kouri: Page 16, line 12.

Q. (I am reading the question and answer): Did he relate anything about any affect to the lower extremities?

A. He related to me a history of numbness to the outer side of his left foot. He alleged no pain in his leg but only numbness. He said that he thought for a while that it might have been due to an injury to his foot in the stirrup but he aban-

(Deposition of Dr. Loyd R. Van Deventer.)

done that idea in that the numbness has continued to this time. [243]

Q. Did you compare the film, films in X-ray, with the ones that were taken by Dr. Ane in New Orleans? A. Yes, sir.

Q. What were your findings from your own X-rays?

A. They revealed very little change, and, again, my films are not as clear as those obtained by Dr. Ane in New Orleans. They do reveal, however, the wedging or the compression of the 10th dorsal, which has been present on all the films.

Q. Do you have an opinion as to whether or not this was an old injury or one that could have occurred, say, in June of 1956?

A. It is my opinion that this is related to the injury of June, 1956.

Q. Doctor, you are familiar with the medical treatise and book by the orthopedic surgeons, Kay and Conwell, aren't you? A. Yes, sir.

Q. They are orthopedic specialists, are they not, and authors?

A. Dr. Kay is dead now. Dr. Conwell—I'm not certain about him. They were very good. I'm not certain—they both may be dead; I'm not certain about Dr. Conwell.

Q. Their works and books on orthopedics are considered excellent, are they not? [244]

A. They are good men.

Q. Doctor, when you have a compression fracture such as you described here, state whether or

(Deposition of Dr. Loyd R. Van Deventer.)

not it involved the disc area around the vertebra, in the injury such as you described?

A. I think almost——”

Mr. Blewett: Now I do object to this, your Honor, upon the ground and for the reason it does not confine it to this particular injury. It says when you have a compression fracture. Go ahead. Let's go on.

The Court: You may answer.

“A. I think almost invariably it does involve the disc.

Q. Now in your examination of Dr. Hargrave's X-rays, including the ones that you made, did you note any difference in the space area, below T-10, the space area?

A. Yes, the films have all revealed—I am referring now to Exhibit 7—they all reveal narrowing of the disc space between T-10 and T-11 so we would call that the tenth disc.

Q. Do you have an opinion as to whether or not that condition was caused by trauma, or not?

A. I would expect it to have been.

Mr. Kouri: Now the next page, line 8.

Q. I asked you about fragments. Does a compression fracture, such as this, ordinarily cause bits of the vertebra to dislodge—portions of it? [245]

A. Well, very rarely does it produce little bit fracture or small fractures of the bone. It does, occasionally. But I would say in fractures of the spine at least ninety per cent of them show no comminution, which would be little bits. In other

(Deposition of Dr. Loyd R. Van Deventer.)

words, ninety per cent of them are fractures of this type.

Q. Isn't it true that the cord becomes involved in compression fractures?

A. It does, occasionally, yes, sir.

Q. Would an X-ray tell whether Dr. Hargrave's cord is affected or not?

A. No, an X-ray wouldn't.

Q. How would you discern that?

A. You would discern that by examination.

Q. Would that be a perfunctory or casual examination or would it be a detailed, technical examination?

A. It would be a neurological examination, a technical examination related to his specific case would involve the bladder, the abdomen, the back, the buttock and both legs.

Q. It would require the services of a neurological surgeon?

A. Or an orthopedic surgeon.

Q. State whether or not in your opinion, in all reasonable medical certainty, whether you have found that this disc has been impaired or damaged to a degree. [246]

A. Which disc do you refer to?

Q. Between T-10 and T-11?

A. It is my opinion this disc has been damaged. I wouldn't attempt to put a name on it as to what damage has occurred, whether it is herniated or not, I wouldn't make that statement but the disc is involved by this injury.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. You gave a report to Dr. Hargrave and to me, dated October 7th, did you not?

A. Yes, sir."

Mr. Kouri: Page 21, line 6.

"Q. So that numbness in the left foot is significant, is it not?

A. Yes, sir. With the question a while ago, I felt that you were interrogating me about the disc involvement at T-10.

Q. Dr. Van Deventer, do you have an opinion in regard to Dr. Hargrave's condition as to whether or not it is temporary or permanent?

A. It is permanent.

Q. Is that your opinion in all reasonable medical certainty? A. Yes.

Q. Based upon your examination of him and your X-rays and your entire examination of Dr. Hargrave? A. Yes, sir. [247]

Q. Do you have—Answer this, please, yes or no. Do you have an opinion, in all reasonable medical certainty, from your examination and findings, as to the extent and percentage of the permanent disability of Dr. Hargrave? Answer that, please, yes or no. A. Yes.

Q. In your opinion, what is the percentage of his permanent disability?

A. In my opinion he has twenty per cent permanent disability to the body now.

Q. In regard to his question, what are you basing that upon?

A. On the injury to the area at T-10, the disc,

(Deposition of Dr. Loyd R. Van Deventer.)

the tenth disc, as well as the tenth vertebral body fracture.

Q. Doctor, let me ask you this: Did you observe anything in the spinal column from the X-rays of Dr. Hargrave relative to any arthritic condition? Just answer that 'Yes', if you did.

A. Yes.

Q. All right, please tell us what you found in regard to that.

A. Well, he shows arthritis in the dorsal spine, which is more marked at T-9 and T-10, disc spaces, than at other areas. There is some degenerative arthritis at other portions of the lumbar spine and dorsal spine but not so marked as the first areas referred to. [248]

Q. What is your opinion in regard to the cause of it around T-9 and T-10?

A. I think that the arthritis is largely normal in his entire back. It was my opinion, and still is, that he shows some increase of the arthritis in the area adjacent to the fracture.

Q. What do you base that—upon your findings in the X-rays?

A. A comparison of the initial film with his most recent X-rays.

Q. That condition, in your opinion—What is your opinion of the future with reference to that arthritic condition?

A. Which condition?

Q. The arthritic condition in T-9 and T-10?

A. First of all, I think the cause of pain in in-

(Deposition of Dr. Loyd R. Van Deventer.)

jury, such as this, is due to the injury and not due to arthritis. The arthritis is a sequel of the injury that occurred and the arthritis begins to build, which occurs at any joint and the back is no exception, but I think the primary cause of his pain is the injury and he will build more spurring and more arthritis than in the other parts of the spine. I would expect that to be true.

Q. In your opinion, will that cause a lot of pain?

A. I don't believe the spurs themselves are the cause of pain. [249]

Q. I'm going to ask you a question about that. Will it cause pain?

A. It does, yes. It does in some people.

Q. Isn't that true because the muscles there—in the layman's language, the spurs are digging into the muscle?

A. Well, we don't know. Probably only 20 per cent of people have pain from spurs in the backbone.

Q. Is it your opinion in regard to the arthritic condition of T-8 and T-10 that it will remain quiescent, dormant, or that it will grow?

A. It will grow.

Q. Could that develop into a serious situation?

A. I doubt very much that it will. I think in all probability his pain may increase but not to the extent that it would be what I would term serious.

Q. Could the situation in regard to T-10 and

(Deposition of Dr. Loyd R. Van Deventer.)
the narrowing of these spaces between T-10 and T-11 be alleviated to a degree by surgery?"

Mr. Blewett: Don't answer that, Mr. Bretz. I want to object to that at this time for the reason there is no evidence in this case surgery has been recommended or that the Doctor will undergo surgery, and there has been no allegation he will have to undergo surgery or any disability will be involved in connection with it.

Mr. Kouri: We will withdraw the question. [250]

Mr. Kouri: Line 18, page 25. This is my last question.

(Reading:)

"Q. In view of what you have related to us, including the compression fracture and the narrowing of space between T-10 and T-11, and the arthritic condition you found, do you have an opinion as to whether this condition will worsen?"

A. I thought we answered that. I believe that it will get worse.

Mr. Kouri: That is all."

Mr. Blewett: Mr. Bretz, can Mr. McCabe borrow your copy while we go through the cross examination?

Mr. Bretz: Yes.

Cross Examination

Mr. Blewett: Ladies and gentlemen, in this type of evidentiary proceeding the right of cross examination is granted to us and what I am about to read and Mr. McCabe is about to answer are the

(Deposition of Dr. Loyd R. Van Deventer.)

questions propounded by me and the answers given by the Doctor after Mr. Kouri had finished his examination.

(Mr. Blewett read the questions and Mr. McCabe the answers.)

“To get the history straight here, Doctor, you graduated from the University of Oklahoma Medical School in 1947? [251] A. Yes, sir.

Q. And interned for one year? A. Yes, sir.

Q. And then you had a three-year residency in orthopedics? A. Yes.

Q. And two years of orthopedics at Sheppard Air Force Base? A. Yes, sir.

Q. What type of work did you do there?

A. Traumatic injuries, almost entirely, hardly any spine work out there.

Q. Did you do any operations?

A. Oh, yes, a large number of operations.

Q. You have been in private practice here since 1953 and all in Wichita Falls?

A. Yes, sir.

A. And is that in connection with your present associate, Dr. Pace?

A. Dr. Pace and I were partners for about a year and a half. Now, we are just officing together.

Q. You said you were a member of the Board of Orthopedic Surgeons and a member of something else——

A. Well, this is the academic organization of the American Board and this is honorary, the American Academy.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. I think you said the first time you ever [252] examined Dr. Hargrave was September the 8th.

A. Yes.

Q. Prior to that time, you had no knowledge of his injury?

A. He reported to me at sometime in the past that he had sustained a fracture of the spine; I don't recall the date, and I didn't make a formal examination.

Q. You have never treated him or examined him any time prior to September 8, 1958?

A. No.

Q. Now at the time you examined him on September 8, 1958, did I understand you to say that you had in front of you, or available for examination the X-rays that were taken in New Orleans?

A. Yes.

Q. As well as the X-rays you had taken?

A. Yes, sir.

Q. Did you have any other X-rays, other than the ones you have mentioned in your direct examination?

A. Yes, this whole volume of X-rays. Dr. Hargrave brought them with him.

Q. In other words, did you look at X-rays other than those you have specifically identified in your direct testimony? A. Yes, many others.

Q. Where were they taken? [253]

A. I don't remember all the places but there are so many films here—we could look at them.

Q. Did any of them pre-date 1956?

(Deposition of Dr. Loyd R. Van Deventer.)

A. No, sir.

Q. Do you know that of your own knowledge?

A. By going through them, yes, sir.

Q. You know that of your own knowledge?

A. By going through them, myself, yes, sir.

Q. The X-rays that were taken by or under the supervision of Dr. Wickstrom—I believe you identified Dr. Ane——

A. I'm not certain that he and Dr. Wickstrom are together but at any rate the films that we did identify were made by Dr. Ane.

Q. And I understood you to say that your examination of those X-rays with the X-rays that you took, reveal that the situation is about the same in his back?

A. That's right.

Q. Was there any change at all that you noted in the X-rays taken by Dr. Ane and the X-rays taken by you?

A. Well, I feel there is a little increase in the arthritis but other than that, there is no change at all.

Q. And how about the X-rays that were identified as those at Bethania? Were there any change in the condition as reflected in the X-rays taken at Bethania Hospital and the X-rays taken by you?

A. Some small difference.

Q. And what would that difference be?

A. Some increase in the arthritis.

Q. And that is the only change?

A. Yes, sir.

Q. How long have you known Dr. Hargrave?

(Deposition of Dr. Loyd R. Van Deventer.)

A. Five years, about ever since I've been here.

Q. And where did you first meet him?

A. I don't recall, probably one of the staff meetings at the hospital when he and I were there.

Q. Was he in active practice when you came here? A. Yes, I think he was.

Q. Do you know whether or not he has been in active practice since you have been here?

A. As far as I know he has. I haven't had a lot of referrals from Dr. Hargrave. As I testified before, he referred me several cases, but as far as I know, he has been in active practice.

Q. You have had referral work from Dr. Hargrave?

A. Probably—I would say not over three cases.

Q. Those were all orthopedic cases?

A. Yes.

Q. Do you know Dr. Hargrave's specialty, if any?

A. General surgery and general practice, I believe.

Q. Going ahead to the estimate of disability that you [255] gave as being 20 per cent, how do you compute the 20 per cent, taking into account the doctor's vocation and profession as a surgeon?

A. Well, I think that is an equitable per cent, percentage of disability irrespective of occupation, with a compression fracture.

Q. Do I understand, then, Doctor that if this were a coal miner or manual laborer, that your estimate of disability would be the same?

(Deposition of Dr. Loyd R. Van Deventer.)

A. No, perhaps not but many times the pain that is provoked with this type of injury will be worsened by a prolonged condition rather than extreme condition.

Q. Your disability, then, is based on the pain rather than the inability to work? A. Yes.

Q. Well, undoubtedly you know from your medical training that compression fractures are quite common in coal miners.

A. I haven't treated any coal miners; I really couldn't say. They are quite common in the military service.

Q. And those people, with proper treatment, get back to work, normally, even at hard labor?

A. Yes.

Q. So a compression fracture, itself, is not particularly a disabling injury, is it?

A. No. [256]

Q. Have you ever treated Dr. Hargrave at all?

A. No, sir.

Q. All you have done is examine him for the purpose of making a rating of disability?

A. Well, the second time I examined him I was aware of the circumstances of the case. The first time I examined him I was not aware of those and I examined him just as a doctor, and as far as I knew, there was no litigation involved.

Q. On the occasion of your second and third examination, you knew that there was litigation involved? A. Yes, sir.

Q. Now, directing your attention back to June

(Deposition of Dr. Loyd R. Van Deventer.)

of 1956 (that part is out). Do you know what treatment the Doctor received in connection with the initial stage of this injury—do you know of your own knowledge? A. No, sir, I don't.

Q. Had you seen the Doctor, upon his return from the north and following this history of an accident which he gave you in 1958, what type of treatment would you have prescribed for the Doctor for the condition disclosed by the X-rays of 1956—I mean the hospital X-rays?

A. I would have prescribed bed rest.

Q. Would you have put him in a cast or an extension brace of any type?

A. No, sir. [257]

Q. Are you at this time, Doctor, able to identify a film that was taken by Dr. Ane which shows the disc spaces or is that information reflected in the pictures marked 25 and 26 which you had on the shadow box heretofore?

A. Yes, sir, that information is disclosed on 25 and 26."

Mr. Blewett: The rest of that has to do with 26, which he has already testified to, and unless counsel objects I will skip that.

Mr. Kouri: Yes, it will save time.

"Q. Now will you tell me in what way now you say the disc spaces are effected as far as 10 and 11 in the thoracic area involved here?

A. Only in as far as there is a narrowing between the vertebrae T-10 and T-11, largely pos-

(Deposition of Dr. Loyd R. Van Deventer.)

teriorly. As you can see here, as compared to this and this."

Mr. Blewett: Your Honor, the rest of this isn't going to make much sense. If I can get approval of counsel I am going to skip right through. It has to do with just about what he has testified to, where he points to the disc.

Mr. Kouri: That is all right. We will agree if it is overlapping you can just stop whenever you want to.

Mr. Blewett: Page 33, line 25.

"Q. I believe you testified that the presence of spurs or arthritis, the growth there is about what you consider average, is that right? [258]

A. Referring to the spine in general, yes, sir, I think so.

Q. (Page 34, line 25) In the history given to you by Dr. Hargrave, did he mention that he had arthritis prior to June of 1956?

A. He mentioned to me that he had had occasional trouble with his low back.

Q. Did he tell you what he thought the trouble was? A. No, sir.

Q. He didn't even mention that he had had arthritis in his back? A. No, sir.

Q. Do you recall the history that Dr. Hargrave gave you in connection with this accident, going into detail of this alleged accident and going into detail of its happening?

A. Well, only insofar as what I have given, and that is, that he was riding horseback and the horse

(Deposition of Dr. Loyd R. Van Deventer.)

caught him off balance and he noticed these two pops.

Q. And did he describe to you at that time where the pops were?

A. Well, he felt as though one of them was down low and one was up higher.

Q. Did he or did he not tell you that the horse started to run and bolted ahead?

A. I got that history later, the next time he came back. [259]

Q. Based on that history, you feel this could have resulted in a compression fracture?

A. Yes, sir.

Q. In your experience as an orthopedic surgeon, what do you consider the most normal cause of compression fractures?

A. The most normal?

Q. We might say the most usual cause?

A. The most usual cause is automobile accidents wherein the occupant is thrown out of the car and the spine is flexed or jack-knifed.

Q. Explain to me your theory here as to how the incident described by the doctor to you would result in this compression fracture.

A. This fracture is a result of a longitudinal force applied on the buttocks, or could have been applied on the head, with a jamming effect of head against buttocks, similar to the fractures we see in electric shock treatment.

Q. In your examination did you restrict it just

(Deposition of Dr. Loyd R. Van Deventer.)

to the history given by him and the X-rays you took?

A. Rephrase that.

Q. What did you do in making your examination of Dr. Hargrave? Tell me in detail the extent of your examination, both subjective and objective.

A. First we got a history as to the injury and as to the complaints he was having at the time and what action [260] provoked pain and what relieved pain and such as that; mainly, what maneuvers relieved pain and what things provoked pain. Then he was examined as far as feats identifying posture and motion of his back and his lower extremities were examined insofar as weakness or numbness, reflex changes, atrophy, and any signs that would suggest nerve pressure, and we had the X-rays of his lumbar and dorsal spine.

Q. What do you have to say with reference to reflex changes?

A. I didn't find any reflex changes.

Q. What is your opinion with reference to whether or not that has a tendency to negative any neurological disorder?

A. I thought he was negative neurologically.

Q. Did you find any evidence in your examination of any previous injury to the spine or any other portion of the body?

A. No, sir.

Q. The only evidence of pre-existing condition was the arthritis showing in the spine as a whole?

A. No, I would say the only evidence of pre-existing injury was compression of T-10.

(Deposition of Dr. Loyd R. Van Deventer.)

Q. There was also existence of arthritis in the spine as a whole? A. Yes.

Q. Can you, with reasonable medical certainty, identify [261] the time as to when the arthritis, the condition in general first had its onset?

A. In general, the onset is about forty.

Q. 1940?

A. No, at forty years of age, but speaking again in general terms, that usually doesn't show in X-ray until about fifty but symptoms of arthritis will begin many times ten years before the X-ray will show spurring.

Q. You can't tell from your examination of a man as to when the arthritic development first started? A. By X-ray?

Q. Or by history? A. No, neither one.

Q. Your opinion here expressed as to the present and time of existence of the—I'll withdraw the question. From your examination of this gentleman, you can't tell the extent of the arthritic development he had on T-10 and T-11 at the time of this alleged injury, is that correct?

A. I couldn't determine the extent?

Q. That's right.

A. Probably not. We usually classify these things as mild, moderate or severe. I could determine it to the extent of what severity it would be, considering his age.

Q. Yes, but I mean, trying to tie in the condition of arthritis which you have testified to here, can you or can [262] you not say that the arthritis

(Deposition of Dr. Loyd R. Van Deventer.)

showing around T-10 and T-11 date to June, 1956?

A. No.

Q. Tell me, Doctor, for my own information, what you describe as an interruption of the inferior cortex, are you referring there to the disc or to fracture?

A. No, that refers to fracture.

Q. The cortex refers to fracture?

A. Interruption of the cortex.

Q. And what do you mean by interruption of the cortex?

A. Well, you take a smooth line and put an offset in it, and that would be interrupted, or a loss of continuity of a given landmark.

Q. That is the degree of compression?

A. No, that is actually the fracture line.

Q. That is the fracture line. Can you show me on a picture what you mean by interruption of inferior cortex?

A. This is P-26, this cortex is interrupted, which is the inferior cortex of T-10.

Q. This is the compression area here, and if there were not interference, this would be down here a little ways, is that what you mean?

A. We don't necessarily have to see an interruption to make a diagnosis of a compression fracture but in this case there is a fracture line which is apparent here, which is [263] part of the compression injury. With compression this cortex is broken. The cortex of the bone did break. It is quite definite compared to this cortex.

Q. I believe you said on direct examination that

(Deposition of Dr. Loyd R. Van Deventer.)

you can't define the involvement of the disc at that point but you, none the less, think it is involved?

A. Yes, I do.

Q. And that is about as much as you can say about the disc?

A. That is all I could say about the disc.

Q. When you say that it is involved, do you make any tests as to the escape of the fluid or anything?

A. Well, no, I don't think it is indicated. He, neurologically, doesn't have any findings there.

Q. Well, then the involvement, in your opinion, isn't very serious as far as the disc is concerned?

A. No, sir.

Q. You would consider that minimum, would you—minimum involvement of the disc?

A. I believe so.

Mr. Blewett: That is all. Thank you for your time."

The Court: We will take a recess now. Court will be in recess now fifteen minutes. (Jury admonished.) Court is in recess. (2:30 p.m.) [264]

(Whereupon at 2:45 p.m., court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

The Court: You may proceed.

Mr. Kouri: By stipulation on medical reports, may we have a moment to offer these. We have agreed on these Doctors who did not appear, and the balance of the X-rays which were not offered.

The Court: #21 through #25?

Mr. Kouri: We offer those, your Honor.

The Court: The X-rays, Plaintiff's #21 through #25 are received.

(Whereupon Plaintiff's Exhibits #21, #22, #23, #24, and #25, being X-rays, were received into evidence.)

Mr. Bretz: We now offer by stipulation of counsel the medical report of Dr. Ane, of New Orleans, dated December 13, 1956, as Plaintiff's proposed Exhibit #26; and as Plaintiff's Exhibit #27, the report of Dr. J. D. Staid, department of radiology, Wichita Falls Clinic Hospital; and as Plaintiff's Exhibit #28, we offer a second report by Dr. J. D. Staid, department of radiology, Wichita Falls, Texas Clinic Hospital.

Mr. Blewett: On this next one, your Honor, Mr. Kouri, may it be understood that this is a true and correct copy of the original? The original has disappeared, your Honor, and I am stipulating that report can go in the record. I have [265] never seen the original.

Mr. Kouri: We will assure the Court it is a copy, your Honor.

Mr. Blewett: It is a true and correct copy?

Mr. Kouri: Yes.

Mr. Bretz: We offer as Plaintiff's Exhibit #29, a report from Dr. Jack Wickstrom, M. D. of New Orleans, dated October 16, 1956.

The Court: As I understand, Mr. Blewett, these four may be received in evidence without objection?

Mr. Blewett: Yes, your Honor.

The Court: Plaintiff's Exhibits #26 to #29 inclusive are received without objection.

(Whereupon Plaintiff's Exhibits #26, #27, #28 and #29, being medical reports, were received into evidence.)

Mr. Kouri: Call Mrs. Hargrave.

MRS. ROBERT HARGRAVE

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Kouri): Please state your name to the Court and jury?

A. Mrs. Robert Hargrave.

Q. Mrs. Hargrave, are you the wife of Dr. Hargrave, the plaintiff in this case? [266]

A. Yes, sir, I am.

Q. And you all live at Wichita Falls?

A. Yes, we do.

Q. And have lived there how long?

A. Oh, I would say almost thirty years, or so.

Q. And little Ann, who preceded you on the stand, is your daughter? A. Yes.

Q. Do you recall planning a trip in June, 1956, the early part? A. Yes, I do.

Q. And did you discuss the matter with your husband and little Ann on many occasions?

A. Yes, we did.

Q. Did you discuss it with anyone else in your neighborhood?

A. Yes, we talked with Ryans.

(Testimony of Mrs. Robert Hargrave.)

Q. Do they live next door?

A. Yes, they do.

Q. Were they planning on going too?

A. Yes, but on another trip. It wasn't with us.

Q. Mrs. Hargrave, then after making your plans did you visit with the Ryans and discuss your various itineraries?

A. The Doctor did. I didn't.

Q. I see. Then approximately when did you all leave [267] Texas to come up here on your trip?

A. I think we left about June 1st.

Q. And just touching on the stops, where did you go to?

A. After we left home we went on through in New Mexico and Colorado and Salt Lake City, and then on into Montana, and then into Canada.

Q. And how much time did you spend in Canada?

A. Oh, I don't recall.

Q. A few days?

A. Yes, not too long.

Q. All right, and then coming back did you come through the State of Montana?

A. Yes, we did.

Q. Did you stop at any particular place on your way back home?

A. Yes, we did.

Q. What place was that please, ma'am?

A. Many Glaciers Hotel.

Q. I see. Now when you came into Many Glaciers had you planned to stay there a while, or overnight or what?

A. No, we did not. Doctor wanted to see the

(Testimony of Mrs. Robert Hargrave.)

Lake and Lake Josephine, a short distance I believe from the Hotel.

Q. Approximately what day did you come into Many Glaciers, if you recall? [268]

A. I believe it was June 23rd.

Q. Of 1956? A. Yes, sir.

Q. Do you recall the Doctor's license number on the car?

A. Oh, I think we had a very short number. It is either 44 or 37, I don't recall which one it was.

Q. Did you happen to run across any friends from home while you were at Many Glaciers?

A. Yes, we did, the Ryans.

Q. Please tell us briefly how that occurred, in your own words?

A. Well, let's see, Doctor and Ann were on this trip.

Q. First? A. Yes.

Q. Let's go into that first. Did you all drive in the car? A. Yes, we did.

Q. What kind of car? A. A Chrysler.

Q. And about what time of day was it when you arrived there?

A. It must have been around eleven o'clock or maybe ten thirty, or sometime right at that time.

Q. Then did you drive toward the Hotel? [269]

A. Yes, we did.

Q. Who was present?

A. You mean in the car?

Q. Yes? A. Ann, the Doctor and myself.

Q. Did you stop there at the Hotel?

(Testimony of Mrs. Robert Hargrave.)

A. Well, up there on the hill, not right at the Hotel.

Q. What was the purpose of stopping there?

A. As I stated, Doctor wanted to see Lake Josephine.

Q. And did Ann desire to go with him?

A. Yes, she did. I wasn't feeling well so I stayed at the Hotel.

Q. You told them then to go?

A. Yes, sir.

Q. And you did not make the trip?

A. No, I didn't.

Q. And about how long were they gone?

A. Well, I don't recall, because I took a nap. After I stayed in the Hotel a while I went back to our car and took a nap.

Q. I see. And then when they approached the car on their return from the trip, was anything stated to you from the Doctor in regard to anything?

A. Yes, the first thing he said——

Q. What was stated? [270]

A. That he hurt his back.

Q. And did he say how?

A. Yes, while he was on the horse.

Q. Was Ann with him? A. Yes, sir.

Q. How did he appear from your observation? Not from what he said, but how did he appear? Physically in other words, Mrs. Hargrave?

A. Well, he seemed highly nervous and in pain.

(Testimony of Mrs. Robert Hargrave.)

Q. I see. Then what happened? Where did you all go then?

A. Well, we found this note on the car at this time.

Q. That is when you found the note from the Ryans? A. Yes.

Q. And what did they say?

A. They asked us to visit them at their camp grounds, Swift Current Camp grounds.

Q. And did you all then go over to see them?

A. Yes. I don't recall whether we had lunch first or went over right then.

Q. I see. Did you find the Ryans there at their camp?

A. Yes, we found the Ryans and their camping party.

Q. And were both Mr. and Mrs. Ryan there, and their group?

A. Yes, and their daughter was with them. [271]

Q. Did you visit with them?

A. Yes, we did.

Q. All right, after that how long did you stay, would you estimate?

A. I really don't remember. I would imagine about thirty minutes or so.

Q. Was anything stated about the injury there at that camp while visiting with the Ryans?

A. Yes, Doctor told them there at that time.

Q. Then was there any discussion about attending a lecture that night?

A. Yes, Mrs. Ryan told us, or stated that she

(Testimony of Mrs. Robert Hargrave.)

would like to have us attend the lecture if we were going to stay.

Q. Did she say anything to you about recommending a motel to stay at?

A. Yes, she did. She said there was a new motel across the road, the main highway I believe, and said if we would stay that we should come down and go to the lecture with them that evening at Many Glaciers Hotel.

Q. Then after that did you and the Doctor and Ann go over to the motel and check in? I mean after you visited with them a while, or did anything else transpire before you went over there?

A. No, not anything.

Q. You went over to the motel? [272]

A. I think we debated for a few minutes, because we had planned on going on that day. But Doctor was having so much pain that we decided then we would stay there that night.

Q. Do you have an approximate time in mind about when it was you went over to the Motel?

A. It seems to me right now that it was around four something. I just am not too certain.

Q. When you checked in then what did the Doctor do, Doctor Hargrave?

A. Doctor Hargrave went to bed.

Q. Did you observe him after he got into bed?

A. Yes.

Q. How did he appear from his facial expression?

(Testimony of Mrs. Robert Hargrave.)

A. He was having pain and he was also chilling at that time. I know I couldn't get him warm.

Q. Did you have any medicine to give him, did he have any he took? A. No.

Q. Nothing at all? A. No.

Q. Then later did someone come over to your motel?

A. Well, we were supposed to meet the Ryans. I don't recall just what time the lecture was to begin, but Mrs. Ryan since we did not come, came over to our motel looking for us.

Q. And did she knock at the door? [273]

A. Yes, and I asked her to step in. I explained to her that the Doctor couldn't go with us, but Ann and I would go to the lecture.

Q. Did Mrs. Ryan say anything to Doctor Hargrave while he was there in bed, in parting? Did she say anything when she parted?

A. Not exactly. I don't really recall.

Q. She stayed briefly I presume?

A. Yes, oh, yes. She waited just a short time.

Q. So then after that, the next morning, do you recall observing Dr. Hargrave when he got up?

A. Yes, he seemed stiff all over, and still in pain. He still had pain at that time.

Q. Did he eventually get up and dress?

A. Yes, he did.

Q. And had you all then planned to leave, back on your trip back to Texas for that day, or had you decided to maybe put it off for a while?

A. No, we wanted to get on home because we had

(Testimony of Mrs. Robert Hargrave.)

been on this trip for sometime and we were anxious to get home.

Q. Now, Mrs. Hargrave, tell us in your own words and briefly what did you do on the way home insofar as the Doctor was concerned?

A. Well, the Doctor was in pain almost all the way home, and especially while he was driving.

Q. Did you put anything behind his back?

A. Yes, he asked me several times if I couldn't help him in some way. He suggested I roll a pillow and put it in this particular spot where it was painful, and also I had to — when it was so severe he asked me to push on his back.

Q. Did you do that?

A. Yes, many times.

Q. On a few or many occasions?

A. Many occasions.

Q. All the way back?

A. Yes, it was that way all the way back.

Q. About how many miles were you from home, about 1,800 wasn't it? A. Yes, about that.

Q. How many days did it take you to get back?

A. Oh, it took us I am sure it was around six days or so. We couldn't make very good time.

Q. How was his condition all the way back, from what you observed, his physical condition?

A. Well, I would say poor.

Q. Did he stop in Denver for any particular matter unusual? A. Yes, sir.

Q. What was that?

A. We stopped at a lumber yard to get a piece

(Testimony of Mrs. Robert Hargrave.)

of board [275] that Doctor felt like maybe if he would push against that in driving, it would give him some relief, and it did at times.

Q. He did use it all the way from Denver into Texas? A. Not all the time.

Q. But at times? A. At times, yes.

Q. From what you observed, would that seem to relieve him in sitting up there?

A. For a short period of time.

Q. I see. Now when you got home, I imagine it was around about—if you left about the 24th you got in about June 30th, something like that?

A. Yes.

Q. And how was Doctor Hargrave's condition for the first two weeks there at home?

A. That was even worse than our trip home.

Q. Tell us briefly and in your own words about what happened, what he did?

A. Well, he was in pain almost constantly. He did go down—he tried to go down to the office for a short period during the day, but he did not stay, and there were several days he did not go to the office at all. In fact, he did hardly any work during those two weeks. He was almost totally disabled.

Q. And after that time did you have an opportunity, Mrs. [276] Hargrave, to observe him at home and in the office? A. Yes.

Q. Incidentally, are you his medical secretary in the office, at times help him?

A. Yes, I do. I work at the office some.

(Testimony of Mrs. Robert Hargrave.)

Q. What percentage of the time would you say you help him out there?

A. Well, almost all the time. We do have a nurse that comes in, and also a stenographer.

Q. Have you had an opportunity to observe him there doing his practicing since you all come back, and since the two week period? A. Oh, yes.

Q. And is there very much difference in the way he gets around even in the treatment of his patients, as compared before June 23rd, 1956?

A. Yes, sir, he tires very easily.

Q. Let me ask you this. We will make these just brief questions. Confining your testimony to prior to June 23, 1956, would the Doctor make complaints like he was making and has been making since that time? A. I am sorry?

Q. Before the injury tell us from your observation how the Doctor got around and carried on his practice and everything? [277]

A. Well, he was much more active before that time.

Q. And was he doing quite a bit of surgery to your knowledge?

A. Yes, and he could do much more work.

Q. How were his office hours then before his injury?

A. Well, they were much later. He has closed oh, an hour earlier at times.

Q. I see. And now confining your testimony to after June 23, 1956, and even up to now, what is the main difference you have observed about him in re-

(Testimony of Mrs. Robert Hargrave.)

gard to his physical condition, comparing it to now and since June 23, 1956, and before that time? The difference you have observed, the major differences?

A. Well, he can't begin to do the work that he did. He can't begin to do the surgery and he can't—in the office he tires—he can't see as many patients and often when he is removing sutures or changing a cast or removing the cast, I recognize that he is in pain because he leaves the room and has to exercise his back.

Q. Did he resort to exercises there at the home when he had that advice from one of the Doctors?

A. Oh, yes, when he went to New Orleans and saw Doctor Wickstrom.

Q. Did you go with him on those trips?

A. Yes, sir, I did.

Q. And did that exercise seem to give him temporary relief? [278] A. Yes, it did.

Q. Just a few weeks ago did you notice anything there in your medical offices in the Hamilton Building? Did you notice anything when Dr. Hargrave was taking care of a patient, anything about the look on his face when he was removing some sutures? A. Yes.

Q. Tell the jury please?

A. When he strains in a particular way it causes his back pain, and maybe that will continue then for a week or three weeks at a time, and then he seems to recover again and is free of pain.

Q. Is he able from your observation to do the same amount of surgery he did prior to his injury?

(Testimony of Mrs. Robert Hargrave.)

A. He——

Mr. Blewett: Mrs. Hargrave, just a minute. I think that is an improper question unless there is foundation laid for it.

Mr. Kouri: I will qualify it, your Honor.

Q. As you are working in the office, and do you handle the books too in connection with the work and accounts?

A. Yes, I do help him with the books.

Q. Then are you in a position to know the amount of surgical and medical work that he does at the hospitals and in the office? [279]

A. No, I couldn't tell you just exactly how much he does.

Q. No, but I am asking you do you keep it in your ledger and books, you look after those, is that true? A. Yes.

Q. Well, then by basing it on what information you have ascertained from them could you tell any difference of the number of patients he was taking care of since the injury and compared to before?

A. It is much less because he hasn't been able to do the work.

Mr. Blewett: Your Honor, again I object.

The Court: The answer is not responsive. It will be stricken.

Mr. Kouri: We withdraw it and ask the jury not to consider the last question and answer. Thank you, your Honor.

Q. Mrs. Hargrave, do you know whether or not

(Testimony of Mrs. Robert Hargrave.)

the Doctor is a member of the staffs on the hospitals there in Wichita Falls? A. Yes, he is.

Q. Now do you know this—and don't answer it if he has an objection. Do you know whether or not he makes the same number of hospital calls since the injury as he did before?

Mr. Blewett: The question is "does she know." That is my understanding. That can be answered.

Q. Just answer that yes or no.

A. Yes, I do know. He doesn't make as many.

Q. Were you helping him in his practice immediately before the war? I mean World War II, or were you taking care of the home?

A. Taking care of the home.

Q. Say in the 40's you weren't doing any work in the office? A. No, sir.

Q. Mrs. Hargrave have you given him any treatment there at home since the accident, from the time you all got back, even up until now recently? Have you treated him yourself?

A. Yes, I have often had to rub his back, if that is what you would call treatment.

Q. Would that seem to give him temporary relief?

A. Yes, that would give him temporary relief.

Q. How often would you do that?

A. As often as once or twice a week, many times in the evening.

Q. Does that seem to give him temporary relief?

A. Yes.

(Testimony of Mrs. Robert Hargrave.)

Q. How are his sleeping habits as compared to the way they were before the injury?

A. He doesn't sleep as well at night as he used to.

Q. How about his nerves? [281]

Mr. Blewett: Wait a minute. Your Honor, I will object to that. There is no qualifications to this witness.

The Court: She can testify to her observations.

Q. From your observation, Mrs. Hargrave, have you noticed any difference about his nerves?

A. Well, he is more nervous, especially when he is in pain.

Q. Has he at times appeared to be irritable?

A. Yes.

Q. Was he that way before the injury?

A. No, he wasn't.

Mr. Kouri: Thank you, ma'am. You may have the witness, Mr. Blewett.

Cross Examination

Q. (By Mr. Blewett): Mrs. Hargrave, did you say something about the exercises the Doctor used to do?

A. Dr. Wickstrom prescribed them.

Q. And how long did Dr. Hargrave continue those, as far as you know?

A. Oh, off and on for several months I know.

Q. Will you describe the exercises that Doctor Hargrave did?

A. I know I can't describe them because I was

(Testimony of Mrs. Robert Hargrave.)

busy with [282] my family and I did not observe them.

Mr. Blewett: That is all. I have no other questions.

Mr. Kouri: That is all.

(Witness excused.)

Mr. Kouri: Your Honor, with that the plaintiff rests. [283]

* * * * *

Mr. Blewett: The defendant will call as his first witness Dr. Russell Richardson.

DR. RUSSELL RICHARDSON

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Blewett): Would you state your name, Doctor? A. R. B. Richardson.

Q. And how old are you? A. I am 59.

Q. And where do you live?

A. Great Falls, Montana.

Q. What is your occupation?

A. I am a Doctor.

Q. And do you have any specialty?

A. I treat injuries for the most part.

Q. You treat injuries? [294] A. Yes.

Q. Do you have any specialty? When you say injuries, does that refer to any type of injury, Doctor? A. Mostly of bones and joints.

(Testimony of Dr. Russell Richardson.)

Q. Does that refer to orthopedics?

A. Yes.

Q. Doctor, where are you associated?

A. I am a member of the Great Falls Clinic.

Q. And where did you go to school?

A. University of Minnesota.

Q. When did you graduate? A. 1928.

Mr. Blewett: And would you admit the Doctor's qualifications or do you want me to go on?

Mr. Kouri: We will admit the Doctor's qualification, yes, sir.

Mr. Blewett: You will admit he is an orthopedist?

Mr. Kouri: Yes, sir.

Mr. Blewett: That will save us a little time.

Q. How long have you practiced surgery and practiced medicine or been as an orthopedic surgeon, Doctor? A. Since 1928.

Q. And where have you practiced all that time?

A. Practically all of it in Great Falls, Montana. I have been here since 1928. [295]

Q. Doctor, did you have occasion recently to examine Dr. Robert Hargrave, who sits to my right in the court room? A. Yes.

Q. Do you know on which date that was you made that examination?

A. I would have to check it. It was on the 19th of January, 1959.

Q. And you made that examination at my request, didn't you? A. That is right.

Q. State whether or not Dr. Hargrave brought

(Testimony of Dr. Russell Richardson.)

with him and delivered to you a group of X-ray pictures which he brought with him, or reported to you he had brought with him from Texas?

A. Yes, he did, and I examined them.

Q. Do you have any idea about how many of those pictures you looked at?

A. I imagine it was between thirty and forty, or maybe more. There was a lot of them.

Q. Doctor, I do not intend at this time to have you identify each of those pictures. I am going to ask you if you don't mind my shortcutting a little bit, but I don't want to hinder your testimony or your desire to answer any questions that may come up, but did you have occasion to examine X-rays which dated from about July 2, 1956, up to the time that you [296] took X-rays or had X-rays under your supervision? A. Yes.

Q. Would you remember if some of the X-rays, or the X-rays you examined were X-rays which were taken by one Dr. Ane, one Dr. VanDeventer, or taken at Bethania Hospital in Wichita Falls? Can you identify those by name at this time, Doctor?

A. I remember examining X-rays which were identified being taken by or at the request of those gentlemen.

Q. And Dr. Hargrave? A. Yes.

Q. For the most part what portion of the body did those X-rays deal with, Doctor?

A. The dorsal spine. That is the part of the body between the shoulders and the waist.

(Testimony of Dr. Russell Richardson.)

Q. Now did you make an examination of Dr. Hargrave yourself? A. Yes, sir.

Q. Would you tell the Court and jury generally here the scope and nature of the examination which you conducted?

A. The examination included a history given by Dr. Hargrave of how the injury occurred, and on his condition following that injury up until the time I examined him; also related facts as he saw fit to give me, and then it consisted of a physical examination which was limited to the most part [297] to the back bone, also involving one foot.

Q. Did you conduct any tests as to reflexes or what you might say objective tests for neurological findings? A. Yes.

Q. Did you take X-ray examinations or X-ray pictures of Dr. Hargrave? A. Yes.

Q. And do you know how many pictures he took or how many pictures were taken under your supervision or direction?

A. Yes, I can't give the number without counting them.

Q. Do you have them with you in Court?

A. I have them with me.

Q. You have the pictures actually taken of Dr. Hargrave while he was in the course of his examination by you? A. Yes.

Q. And did you do anything else in connection with your examination of Dr. Hargrave, and what else if anything that I haven't asked you, did you do in examining him?

(Testimony of Dr. Russell Richardson.)

A. I took a history and examined his X-rays and the ones I took. I also consulted with my associate Dr. Wallgamott.

Q. Was Dr. Wallgamott present when the Dr. was being examined, most of the time?

A. No.

Q. Did Dr. Wallgamott examine the Doctor at any time after you did? [298]

A. We both examined him separately.

Q. Then you consulted? A. Yes.

Q. In connection with your examination of Dr. Hargrave did you have occasion to check his mobility or range of motion in the back area?

A. Yes.

Q. And what do you have to say with reference to your findings on that examination, Doctor?

A. Well, very close to the normal range of motion for a man 54 years of age and a general build like Dr. Hargrave.

Q. In conducting that type of an examination, Doctor, what do you have or what do you request the patient to do?

A. In testing motion of the back and agility of the back, we have them bend forward, backward sideways, and then we have them twist to one side or the other.

Q. In the course of that examination was that done while you were standing by watching the Doctor? A. Yes.

Q. Did he at any time in the course of those movements complain of pain or discomfort to you?

(Testimony of Dr. Russell Richardson.)

A. Let me check my notes. These are notes which I made subsequent to the examination. They are the notes included in the report from Dr. Wallgamott. No, no pain.

Q. Doctor, in the course of your examination of Dr. [299] Hargrave did you ask him to—maybe you have already answered this—did you say you asked him to bend forward? A. Yes.

Q. Now, Doctor, directing your attention to the X-rays which you observed, will you tell the Court and jury at this time as to what condition you observed in the X-ray pictures covering Dr. Hargrave's spine, taken about July 2, 1956?

A. That film is not handy for me to check, is it?

The Court: Yes, they are all here, Doctor.

A. I think I can remember.

Q. We sort of agreed we would hurry through all the X-rays, but I am certainly willing to have you go through the whole thing. The jury has looked at a lot of X-rays.

A. As I recall, the films are——

The Court: 13, 14, 15 and 17 were the first four.

A. I don't want to be misleading, I would just want to check myself. There is another view taken from a different direction.

The Court: I think 13, so that the record would be clear, 13 was taken October 11, 1956.

Q. I think that is right, your Honor.

A. #14 is August 4, 1958.

Q. It should be 19 or 20 according to my notes.

(Testimony of Dr. Russell Richardson.)

The Clerk: 19 and 20 are the exhibits attached to the deposition. [300]

Mr. Blewett: I thought these were in evidence, your Honor.

Mr. Hargrave: Here is another one made on that day.

Mr. Blewett: May it be stipulated these may be introduced at this time?

Mr. Kouri: Yes.

A. This one is dated July 2, 1956.

Mr. Blewett: Let me just introduce it a minute here. This would be Defendant's 30. And this is 31.

The Court: Any objection?

Mr. Kouri: No objection.

The Court: Defendant's Exhibits #30 and #31 are received without objection.

(Whereupon Defendant's Exhibits #30 and #31, being X-rays, were received into evidence.)

Q. (By Mr. Blewett): I am handing you now, Doctor, exhibits Defendant's Exhibits 30 and 31, and I would like for you to look at those and tell the Court and the jury generally the condition of the back as reflected by those X-rays, if you will?

A. I am now looking at an X-ray taken of the back of Dr. Hargrave, taken at the Bethania Hospital, Wichita Falls, Texas. This is an X-ray taken from the back towards the front or the front towards the back. Anyway it is an anterior posterior direction. And this X-ray shows a slight curvature

(Testimony of Dr. Russell Richardson.)

of the spine [301] if you people can see it, in the lower lumbar region, and in the dorsal region, that is the region where you can also see ribs attached. We can see some spur formation, particularly in the regions of the 8th, 9th and 10th dorsal vertebrae, some spur formation and irregularities in the lumbar area. That is the area just above the pelvis. Now this (#31) is a lateral X-ray taken of the same general area, and this X-ray picture shows the same general area of the body, and it shows from the 7th dorsal vertebrae down. Those dorsal vertebrae are all showing some spur formations and irregularities on the body. The 10th dorsal vertebra which is designated #10, shows a narrowing in the anterior portion of the body so that vertebrae so that it is wedge shaped backward forward. That has considerably more of the spur formation and irregularities on its surfaces than the others show. And as we go down we see some spur formation and irregularities also down in the lumbar area. That is usually designated as hypertrophic osteo perosis, or arthritis. In addition to that we see some increase in the dorsal curve. There was more curve than we ordinarily see. We also see some increase in the lumbar curve, which is in the opposite direction, which is usually described in medical terms as an increase in the dorsal curvature and the lumbar lordosis. You don't have to remember those big words. They don't mean any more than increased curves.

Q. Doctor, is that what is sometimes referred to as [302] curvature of the spine?

(Testimony of Dr. Russell Richardson.)

A. No. Ordinarily a lateral curve we think of as you said, curvature of the spine.

Q. Is that the same as a hollow back?

A. Yes, this is the same as a hollow back, the lordosis. That is the same as a hollow back.

Q. From that X-ray, Doctor, do you have an opinion as to whether or not Dr. Hargrave on that date had a normal back?

A. He does not have a normal back.

Q. Now as to the hypertrophic or arthritic changes which you mentioned there, can you or do you have an opinion as to whether or not the arthritis and hypertrophic changes there were prior or antedated June, 1956?

A. They would undoubtedly have.

Q. You can be seated now, Doctor, if you will, unless you want to refresh your observation with those pictures any more.

A. Well, I would like to say we consider this is a compression fracture of the 10th dorsal vertebra.

Q. These pictures show a compression fracture of the 10th dorsal vertebra?

A. That is right.

Q. Now, Doctor, you testified a few moments ago you had occasion to review X-rays which have been taken of and on from that time up until the present time. In those X-rays [303] that you last took or had taken, as well as some of the later X-rays which the Doctor showed you, is there still evidence of a compression of that 10th dorsal? A. Yes.

Q. What is the condition of that vertebra as re-

(Testimony of Dr. Russell Richardson.)

flected to you upon your examination of those latter X-rays? Do you understand my question?

A. Not quite.

Q. Well, I will lead you, and Mr. Kouri can interrupt me any time he wants.

Mr. Kouri: Go right ahead.

Q. What percentage of compression do you find in that 10th dorsal vertebra as of the last X-rays you had taken, and the last X-rays Dr. Hargrave furnished you?

A. Well, there is no change in the amount of compression between the last ones Dr. Hargrave showed to me and the ones we took.

Q. In other words, the condition is remaining static so to speak? A. That is right.

Q. Speaking percentagewise, and taking into account the measurement of the adjacent vertebrae in that area, what percentage of the compression exists in the 10th dorsal vertebra?

A. About 10, possibly 12 per cent.

Q. And did you measure that yourself, Doctor?

A. Yes.

Q. And that is measured with a ruler of some sort?

A. We use a transparent ruler that we can see through, so that the measurement will be more accurate.

Q. And the measurement of a vertebra is made how, in centimeters?

A. Yes, we usually use a metric scale because it is smaller units.

(Testimony of Dr. Russell Richardson.)

Q. And it is your opinion that this one compression, the 10th dorsal, shows about a 10 per cent compression? A. That is correct.

Q. And directing your attention to the series of X-rays from July 2, 1956, up to the present time, what have you to say, Doctor, with reference to the condition of arthritis which you find in Dr. Hargrave's spine?

A. It was present on the first X-rays and it is still present, and the increase was not out of normal expectation for a man of his age group.

Q. There is some increase?

A. There is some increase.

Q. But it is within normal range or limitation or increase for a man of his age?

A. That is right. You understand that people vary considerably as to the rate of change that is is taking place.

Q. Doctor, in your examination of the X-rays, and when [305] I use the word X-rays, for brevity I am going to include all of the X-rays that we have had occasion to consider, did you find any evidence of involvement of the disc?

A. The disc space between the 11th and 12th dorsal vertebrae seems to be slightly narrowed.

Q. Do you have any medical opinion as to what causes that narrowing of the space at that point?

A. Yes, I have neglected to in reading those X-rays—I neglected to call attention to that. I do not know if it shows as well as in some later ones, attention to the defect in the lower surface of D-10,

(Testimony of Dr. Russell Richardson.)

a defect which is commonly known as a smart. It was felt that the contents of the disc space collapsed into the lower surface of the body of that vertebra, producing that smart, and that accounts for the narrowing. In other words, it just went somewhere else.

Q. It went into the body of the vertebra?

A. Yes.

Q. State whether or not in your opinion that is a serious or is not a serious situation as far as the disc or the vertebra is concerned?

A. Smarts are not considered to be serious.

Q. Now, Doctor, upon your examination of these X-rays, including the ones of more recent date which show the healing progress in this area, is there any evidence as to what has happened to that disc or the smart, as you call it? [306]

A. Well, it has gradually filled in and healed.

Q. And that is part of nature's process, isn't it?

A. Part of nature's process. Smarts don't always disappear completely, however.

Q. Has this one disappeared?

A. Apparently so. You don't see it.

Q. On the recent X-rays you can't detect it?

A. That is correct.

Q. Now in this particular fracture, and based upon your examination of the X-rays as well as the neurological tests which you conducted, do you find any evidence of injury to the cord of Dr. Hargrave?

A. No.

Q. I believe you have testified here that there is

(Testimony of Dr. Russell Richardson.)

about a 10 per cent compression of the 10th dorsal here. Will you state your opinion as to how that degree of compression is classified, either as mild, moderate, or severe?

A. It is classified as mild.

Q. A mild compression? A. Yes.

Q. Do you have any idea at this sitting, Doctor, how many compression fractures you have treated in the some thirty years you have been here?

A. It would be several hundred. I have never counted them up. [307]

Q. Have you ever had occasion to find a smart or a compression fracture for a person who did not even know he had it? A. Yes.

Q. In your experience in treating compression fractures have you ever had occasion to treat a compression fracture arising out of or connected with a person riding horseback? A. Yes.

Q. Have you ever had occasion or experience treating a person suffering a compression fracture by riding a horse, and on the basis of the history as related to you by Dr. Hargrave? A. No.

Q. Now did you find any other condition in Dr. Hargrave's spine which might account for his alleged compression fracture as a result of his riding this horse?

A. It appears to me that there is some loss of calcium in the bones of his back, that his bones are not as strong as the average person's bones. We call that osteoporosis. That is not a marked osteoporosis, and osteoporosis is something which is rather diffi-

(Testimony of Dr. Russell Richardson.)

cult to be definite about, because the appearance varies with X-ray techniques, and even changes in the current when the X-rays are being taken. It is my opinion there is some present.

Q. Would you advise the Court and jury here, Doctor, as [308] to where on this 10th dorsal vertebra the major portion of this compression is?

A. It is on the lower surface.

Q. And what surface is that called?

A. Inferior.

Q. From your experience in treating that type of fracture, is it common or rare?

A. It is not nearly as common as fractures in the upper or superior surface.

Q. As far as mobility of the back, not just in the area of the 10th dorsal, Doctor, what have you to say as to the normal or general mobility of a person's back in the area of the 10th dorsal?

A. Very light. The only mobility is probably in twisting, and some lateral bending, but it is relatively immobile because it is held more or less rigid by the ribs.

Q. Actually that portion of the body is not called upon to perform motion or mobility as much as the lower part, is it?

A. That is correct.

Q. Now in the history which the Doctor gave you at the time of the examination, did he mention the type of work he does, Doctor Richardson?

A. Yes.

Q. And do you understand that he is a surgeon and general practitioner? [309]

A. Yes.

(Testimony of Dr. Russell Richardson.)

Q. Taking the Doctor's back condition as a whole, it is defined as kifosis and scoliosis, isn't it?

A. Yes, there is some scoliosis present.

Q. State whether or not that condition could cause the Doctor's stature or general stature to be a little off kilter, or to be a little different than what the normal person is? I am not sure I have given you that question exactly. I would like to reframe it in this way. Does a person with this condition of scoliosis or kifosis have a tendency toward back pain or trouble?

A. Yes, they may have trouble.

Q. In the examination made by you did the Doctor disclose to you any history of previous back trouble up to the present time? A. No.

Q. Did he give any history of previous back trouble at all?

A. Well, not that I recall. (Referring to notes.) I have no recollection of him stating whether he did or did not. Are you referring to before he got hurt or after?

Q. Before June 23, 1956?

A. I haven't got any record in my notes, and I don't recall. It was my recollection he said it did not bother him, but I wouldn't be sure he did say that. [310]

Q. This condition of scoliosis and kifosis you find in the X-ray, would you direct your attention to that and state approximately how long it has been present in the back, if you can?

A. Well, it was practically all his life.

(Testimony of Dr. Russell Richardson.)

Q. Is that what is known as a congenital condition? A. Postural would be better.

Q. A postural condition?

A. Yes. Congenital refers to things people are born with. I wouldn't say for sure this was congenital.

Q. Doctor, bearing in mind the condition of the Dr's back as it is reflected to you in these X-rays, isn't it possible he could have back pain even without regard to this compression fracture that you noted? A. Yes, he could have.

Q. Do you have an opinion as to what duties a surgeon and physician in general practice such as the Doctor has described, can't do because of the condition in the 10th dorsal vertebra here?

A. I think he would be able to do all the things I can think of.

Q. From your opinion there is nothing he can't do in the way of his practice as a physician and surgeon? A. That is right.

Q. Now, Doctor, tell the Court and jury, if you will, [311] approximately what time of the day you get tired in your work as a surgeon?

A. Oh, about four thirty or five.

Q. Four thirty or five?

A. Yes, sometimes earlier.

Q. May I ask you this, Doctor, will you check your notes and see if Dr. Hargrave gave you any history of a foot condition?

A. Yes, he stated that he had a numbness in the instep and arch of his left foot, tingling sensation,

(Testimony of Dr. Russell Richardson.)

described it more of a tingling rather than a numbness.

Q. Do you have any opinion as to whether his left foot could be connected with the 10th dorsal vertebra? A. It couldn't be.

Q. It couldn't be?

A. It couldn't be even though there were a cord injury at that level.

Mr. Blewett: We have no other questions.

Cross Examination

Q. (By Mr. Kouri): Doctor, I believe you have stated you are 59? A. That is right.

Q. And that you leave your office somewhere between four thirty and five? [312]

A. No, I get tired at that time.

Q. I thought that is what you testified on direct examination.

A. I testified I got tired at four thirty or five o'clock, not that I left the office.

Q. When you were 48 years old did you get tired between four thirty and five?

A. No, I began noticing it when I was around 50, and a little beyond there, during the last seven or eight years.

Q. Now how many X-rays did you take, Doctor?

A. I can count them up. I don't remember.

Q. Don't you remember how many you took off hand?

A. I think I had five taken, and my partner took two or three more.

(Testimony of Dr. Russell Richardson.)

Q. You found that narrowing of space, didn't you? You found the narrowing of the intervertebral disc or interspace between thoracic vertebrae 10 and 11, didn't you? A. Correct.

Q. Did you make a measurement of thoracic vertebra #10? A. As to its width?

Q. Yes. A. Yes.

Q. I have here, Doctor Richardson, Plaintiff's Exhibit #16. What were your findings with regard to the width of thoracic vertebra #10? [313]

A. You mean the thickness?

Q. The width or thickness, yes, sir.

A. I don't recall the exact centimeter measurement now. I wouldn't try to give it to you. I reduced it to a percentage, which satisfied myself.

Q. How much difference was there in the width of #10 and the one above, being T-9 and the one below being T-11?

A. There was approximately 10 per cent difference on an average, 10 or 12.

Q. That is the vertebra that was depressed, T-10, is that not true? A. Yes.

Q. And in your report you found from reading these other X-rays that on the X-rays that were made in July of '56, in comparing those with the X-rays made in August, 1957, there had been more compression?

A. There had been slightly more, that is correct.

Q. You noted the spurring and the lipping also, did you not? A. Yes.

(Testimony of Dr. Russell Richardson.)

Q. And you noted the narrowing, as I asked you a moment ago, of the space? A. Yes.

Q. That is the disc area there?

A. The disc area is the space between. [314]

Q. Yes? A. Yes.

Q. What per cent was it narrowed in comparison to the vertebra below it, the 11th one?

A. I wouldn't be able to give you the percentage. It appears narrower.

Q. It is quite notable, isn't it?

A. It appears narrower, yes.

Q. And also you did not perform a myelography on the Doctor? A. No.

Q. That would have enabled you, wouldn't it, to have determined whether or not that disc between T-10 and T-11 was herniated or ruptured or damaged, wouldn't it?

A. Yes, it would, surely. We wouldn't ordinarily do it with his group of symptoms, but if it had been indicated we would have.

Q. That is the technical way of ascertaining the exact area in the spinal column whether a disc is concerned or ruptured, isn't that true?

A. You are correct. We don't ordinarily. We wouldn't consider doing a myelography under the circumstances.

Q. But that is the technique you would use, isn't that true? A. That is right. [315]

Q. Now on these tests that you made with reference to the bending now in your report, I am referring to you and Dr. Wallgamott, you stated a

(Testimony of Dr. Russell Richardson.)

straight leg raising at 85 per cent produces some tightness of the back? A. That is right.

Q. And you, going on further from the paragraph under your examination, disturbance of sensation to cotton and pin prick is present over the medial aspect of the left lower leg?

A. Now I did not do that test so I am not able to answer you.

Q. I thought you told on direct examination you and Dr. Wallgamott were in consultation and made your examination together?

A. That is correct, but remember I also testified that I wasn't in the room when he examined him, and he wasn't in the room when I examined him.

Q. You were not in the room for the leg raising test and other test?

A. I have my own notes on that. I concur in that. I did not do that particular test. That is, I did not compare the left foot with the right.

Q. Did you find this, a little tenderness is present—the test on the left foot? A. Yes.

Q. X-rays of the dorsal and lumbar spine had been required [316] by Dr. Richardson, and I had a request for an X-ray of the left foot. That is under Dr. Wallgamott's signature? A. Yes.

Q. And that is true, isn't it, about the request on the X-ray of the left foot?

A. That is right.

Q. Now, Doctor Richardson, you knew that Dr. Hargrave at the request of the defendant through

(Testimony of Dr. Russell Richardson.)

his attorney agreed to come over and subject himself to an examination by you at your clinic?

Mr. Blewett: I don't know whether that is competent or material, and I object. The law distinctly gives us the right to do that.

The Court: I think that is right. Objection sustained.

Q. (By Mr. Kouri): Now in regard to that numbness that he related, Doctor, that lower extremity, will you please tell us, Doctor, the origin of the sciatic nerves? What part of the spinal column they originate from?

A. The second lumbar down.

Q. Then do they radiate down the lower nerves?

A. Yes.

Q. Do they radiate from all of the five lumbar vertebrae?

A. Nerves come from all five of them, yes. [317]

Q. If there was some involvement of the nerve around lumbar vertebra 4, involvement I mean pinched, would the pain radiate down the lower extremity?

A. Yes.

Q. If it was #4 could it stop at the knee or would it then go on below into the calf and on down?

A. Well, there may be some variation in distribution, but ordinarily to get down to the foot that is lumbar #5.

Q. From lumbar 5? A. Yes.

Q. Between 4 and 5?

A. Between 5 and S-1.

(Testimony of Dr. Russell Richardson.)

Q. Between 5 and S-1? A. Yes.

Q. Anyway the pain could radiate down if the involvement is in the proper area, at the lumbo sacral area, the pain would radiate like down to the toes? A. Yes.

Q. Now, Doctor, how do you account for the fact that he has this numbness which only had originated since the time of this injury, in that particular foot? What else could you attribute it to?

A. I don't quite get the gist of your question.

Q. Let me rephrase it?

A. I would like to be as helpful as I can. [318]

Q. Certainly, thank you. He related to you about the numbness, did he not? A. Yes.

Q. Did he say something about a tingling in the foot? A. That is correct, yes.

Q. You made X-rays of it?

A. That is right.

Q. At least like you said in the report, you all were concerned enough you wanted to make X-rays of the foot? A. That is correct.

Q. Now my question is this, Doctor, how do you account medically speaking for the fact of the numbness and the tingling when he at the same time has the injury in his lower back?

A. Well, these complaints with regard to the 12th dorsal vertebra.

Q. I am excluding that?

A. On the basis—let me answer you this way. On the basis of what Dr. Hargrave related to me regarding his other complaints and on the basis of the

(Testimony of Dr. Russell Richardson.)

physical examination we made of him and the X-ray examination we made of him, I would be totally unable to account for the numbness in his left foot.

Q. Doctor, didn't he relate to you at the time of the injury that he felt two pops in his back, one in the upper and one in the lower part. Did he relate that to you? A. Yes. [319]

Q. The lower part, that is the lumbo sacral part?

A. Yes, but he does not have the usual signs or symptoms that we could consider a disc lesion in the lumbo sacral region.

Mr. Kouri: Now, of course, I am not in a position here, your Honor, to cross examine with the report part of it being made by another Doctor, so on these tests that were made I will have to skip them.

Mr. Blewett: Have you read Dr. Wallgamott's report?

A. I have glanced through it.

Mr. Blewett: I am perfectly willing that the Doctor talk on it.

Mr. Kouri: I don't want to take any more time, if they will stipulate on this report like we did on the others, that will be satisfactory.

Mr. Blewett: Yes.

Mr. Kouri: Very well.

Q. (By Mr. Kouri): Doctor, how much permanent disability is Doctor Hargrave going to have?

[No answer in copy.]

Q. Out of 100 cases let's say like this, say that you have had, that you have read about in authoritative medical works, out of 100 cases what per cent

(Testimony of Dr. Russell Richardson.)

out of those will become totally and permanently disabled?

Mr. Blewett: Wait just a minute. Your Honor, I object to that as being an improper question. It is not [320] directed to any issue involved in this particular litigation. If Mr. Kouri wants to limit his question to a compression fracture of this nature, of the size and stature of Dr. Hargrave, I have no objection.

Mr. Kouri: I am going to ask him about this authority. I am sure Dr. Richardson is familiar with it.

A. I wouldn't be able to say.

Q. Doctor, are you familiar with the work Key and Conwell? A. I have read the books.

Q. They are authorities, are they not, in the orthopedic field, at least were? I understand they are dead.

A. I am familiar with their work. They are well thought of. Dr. Key is dead. Doctor Conwell is still alive.

Q. Are you familiar with Dr. Philip Wilson, Professor Emeritus, Northwestern University?

A. Yes, sir, I have read some of his work.

Mr. Blewett: Just so we understand, your Honor, there is some question in the law as to whether those can be read into the evidence.

The Court: I think my understanding of the rule is that a witness may be cross examined on a textbook if he has stated that his opinion is based on the study of textbooks in question.

(Testimony of Dr. Russell Richardson.)

Mr. Blewett: I don't think that has been done, your [321] Honor. I was going to object to it.

Mr. Kouri: I did not understand the Court.

The Court: I think the rule is that a medical witness may be cross examined if a foundation is laid that he is basing his testimony on his own experience and also on textbooks that he has read.

Mr. Kouri: That is the question I had asked him, based on his observations of fractures plus medical authorities he had read. I will reframe it if the Court likes.

The Court: Would you lay that foundation and I will permit him to answer.

Q. Doctor Richardson, I will ask you this. On not only compression fractures, but fractures of the spine, taking 100 cases say you have had and the cases you have read about in the medical authoritative textbooks, those that have been recognized, out of 100 how many would you say out of that 100 would be totally and permanently disabled?

Mr. Blewett: Wait a minute, I object.

The Court: Objection sustained. I don't think you have laid a foundation that the basis of his testimony is from the textbooks he has read.

Q. All right, I will put it this way. Do you agree, Doctor, that out of 100 cases that you have had that 23.5 per cent were totally and permanently disabled of fractures of the spine? [322]

Mr. Blewett: Your Honor, I move that the question be stricken and the jury admonished. There

(Testimony of Dr. Russell Richardson.)

has been no foundation for the question which Mr. Kouri has made.

The Court: I think you have to limit it to the injury here. I don't think you can say fractures of the spine. If you say compression fractures I will let him answer.

Mr. Kouri: We except to the Court's ruling.

The Court: I think you will have to lay a further foundation.

Q. (By Mr. Kouri): Doctor Richardson, how many cases of this nature, compression fractures, have you had say in the past five years or ten?

A. Any answer I would give would be a guess. I don't keep any statistical record. That would be like asking how many something else I had.

Q. About how many in the last ten years?

A. Now what type of compression fractures are you speaking of now?

Q. Let's say mild and moderate, all of them, minimal, mild and moderate?

A. Which area, all areas?

Q. All areas, or better, the thoracic area?

A. Oh, this is purely a guess. I don't know if it is any good to anybody. I don't even swear it is right to myself. I suppose somewhere around 20.

Q. What percentage of those were permanently disabled?

Mr. Blewett: Your Honor, I again object. There is no proper foundation for this unless he shows the circumstances to be somewhere similar to here.

Mr. Kouri: I am trying to do that now.

(Testimony of Dr. Russell Richardson.)

Mr. Blewett: I think he has got to go a little further with his foundation and show the type of work and so on. I will withdraw the objection. Let the Doctor go ahead and answer.

Q. Go ahead, Doctor.

The Court: You may answer.

A. I am trying to think. In the last five years?

Q. Five or ten, yes, sir.

A. Well, it makes a lot of difference.

Q. Let's go to the last ten years, Doctor?

A. I think two.

Q. Two out of twenty?

A. Something like this. This is all guess. Remember everything I am telling you is guess, and the best of my memory.

Q. Is this based on five or ten years?

A. I think two in the last ten years, in the dorsal spine location. These were both complete fractures.

Q. What about the lumbo sacral area, how many would you say out of that twenty? [324]

A. Of course, you see more of those——

Mr. Blewett: Your Honor, I would like to get the record straight. As I understand, even on the plaintiff's case the most favorable testimony he has is about a thirty per cent fracture of the 10th dorsal. I don't see the competency or relevancy of any other back injuries.

The Court: As I understand this last question, the Doctor said this was where there was a frac-

(Testimony of Dr. Russell Richardson.)

ture or dislocation with paralysis of the body, the lower level of the body? A. Yes.

The Court: It seems to me it should be limited to the type of fracture that was claimed here.

Mr. Kouri: Yes, sir, I know, but the interrogation had been going on the thoracic and lumbar area. In the interest of time I will withdraw that last question.

A. If it would help you out, if you wanted me—if you wanted to ask me about comparable fractures of that area I could answer you very easily, if it would be any help to you or to the Court.

Q. Well, Doctor, you say you have a copy of the report, the copy of the report that you and Dr. Wallgamott prepared together, and he signed, is that right? A. No.

Q. Do you have a copy with you?

A. I have nothing to do with the writing of this report. [325]

Q. This question and then we will conclude this cross examination. This last short paragraph, will you follow me while I read it to the jury, and see if you concur in it? The last paragraph. It is my belief that Dr. Hargrave did sustain a mild compression fracture of the 10th dorsal vertebra as a result of the injury described on June 23, 1956, and that this fracture has now healed completely; the presence of osteoporosis which antedated the injury could well contribute to his present symptomatology. On the basis of objective clinical findings at this time no explanation for the symptomatology is

(Testimony of Dr. Russell Richardson.)

found which is described. On the basis of X-ray findings, however, it is my opinion that such symptomatology may be justified and explained by the compression fracture of the 10th dorsal vertebra and the osteo arthritis present. Do you concur with him in that?

A. In general, yes.

Q. Now this, and then I will conclude. In regard to the osteo arthritic condition, if we had it before and it is in a dormant stage, certainly an injury like the Doctor received on this horse could have caused it to flare up and aggravate it and result in the condition which you found here yesterday or the day before?

A. I don't quite follow you.

Q. In all reasonable medical certainty, Doctor?

A. I am not arguing with you. I did not quite follow you. [326]

Q. If he had the arthritic condition before. Incidentally we all have it from a certain age?

A. I have about as much as the Doctor has.

Q. If he had the arthritic condition before June 23, 1956, through this trauma on the horse it would result in an aggravation and injury to that area in the spine, it could aggravate the condition which resulted in what you found on your examination in regard to the arthritis, could it not?

A. Yes, it could.

Q. Now, of course, Doctor insofar as the injury you do not know whether he was thrown forwards or backwards on the horse?

(Testimony of Dr. Russell Richardson.)

A. Of course not. I was not present at all and he can't tell me.

Q. And using just a matter of logic, if a horse would bolt, naturally the body would go backward wouldn't it, using common sense?

Mr. Blewett: Your Honor, I object to that as assuming a state of fact in this case that hasn't yet been shown.

The Court: Well, I will let him answer.

A. Well, I have ridden quite a few horses and had them bolt. I always went forward. My natural muscle reaction was to go forward, and I don't see how he could get a compression fracture going backward.

Q. You did conclude in your report that the compression [327] fracture was due to the injury on the horse? That is what you said in the report?

A. I can't argue with that.

Q. No, you can't.

A. I didn't want to.

Mr. Kouri: That is all.

Redirect Examination

Q. (By Mr. Blewett): Doctor, I believe you testified on cross examination you would give Doctor Hargrave about 10 per cent disability rating at this time? A. Yes.

Q. Would that include the entire back condition he has, the scoliosis, curvature and arthritis?

A. Yes, I can't separate them.

Mr. Blewett: That is all.

(Testimony of Dr. Russell Richardson.)

Recross Examination

Q. (By Mr. Kouri): Doctor, you are going to send a bill for examining, for your services, and for your testifying here to the defendant?

Mr. Blewett: I object to that as incompetent, irrelevant and immaterial. [328]

The Court: I think it is clear he testified here for the defendant. I presume he sent his bill to the defendant.

Mr. Blewett: I will pay you for the examination, Doctor.

The Witness: Yes, where am I going to send the bill.

Mr. Kouri: That is all.

(Witness excused.)

The Court: Court is now adjourned until 9:30 tomorrow morning. (Jury admonished.) Court is adjourned until 9:30 tomorrow morning. (5:15 P.M.)

January 23, 1959, 9:30 A.M.

The Court: You may proceed.

Mr. Blewett: We will recall Mr. Dillon, if you please.

VIRGIL T. DILLON

having been previously sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Blewett): Would you state your name again, Mr. Dillon? A. Virgil T. Dillon.

(Testimony of Virgil T. Dillon.)

Q. And are you the same Mr. Dillon who has heretofore testified in this action? A. Yes, sir.

Q. Now, Mr. Dillon, I understand from the examination of you by Mr. Kouri earlier in this trial that you stated that these horses were trained to follow? A. Yes, sir.

Q. Will you explain to the Court and jury a little more fully what you mean by a horse being trained to follow, as distinguished from a lead horse?

A. Well, about the only thing I can say about a horse is there are some horses that make lead horses and some horses that won't go down the trail unless another horse is in the lead. So those are the type of horses we have to follow the lead horse.

Q. Well, when you say a horse will follow another horse, did you mean to imply or infer that one horse will do anything and everything any other horse will do? A. No, I don't mean that.

Q. If a horse would stand on its front hoofs, the horse behind wouldn't necessarily follow, would it? A. No, sir.

Q. On this return trip from Josephine Lake where do the horses go? A. To the hitch rack.

Q. And do they get fed or watered?

A. No, sir.

Q. Now, Mr. Dillon, directing your attention to June 23, 1956, and the point where there was some conversation between you and the Doctor as to his getting off his horse, will you tell the Court

(Testimony of Virgil T. Dillon.)

and jury at this time where to the best of your knowledge this conversation took place?

A. It was just beyond the road into the Hotel. It was I would say we took the horse trail back after we got off of the road to the hotel, that was the service road.

Q. This conversation took place on a horse trail as it left the service road? A. Yes.

Q. I believe you testified on direct examination—maybe you didn't—I am not trying to put words into your mouth, but [331] it is my recollection you mentioned this road on your examination by Mr. Kouri, this service road? A. Yes.

Q. Is that the one you had in mind?

A. Yes.

Q. Did the Doctor at the time of this conversation, or at any time from the time you saw the Doctor until they left the hitching post after the ride, ever say anything to you about running your horse, or accuse you of running your horse?

A. No, sir.

Q. The fact of the matter is, Mr. Dillon, did you or did you not run your horse?

A. No, sir.

Q. Now can a horse such as Skeeter on a trip like this be held back by the person riding him?

Mr. Kouri: I believe we will object to that as it invades the province of the Court and jury and calls for a rank conclusion.

The Court: Objection overruled.

Mr. Kouri: Exception.

(Testimony of Virgil T. Dillon.)

A. Will you repeat that?

Q. My question was can a horse such as Skeeter be held back by the person riding him?

A. Yes.

Q. Now, Mr. Dillon, have you worked with horses in a [332] park concession not only for Mr. Wellman, but for anybody who ran horses in the park?

A. My first year there was in '32.

Q. 1932? A. Yes.

Q. And have you been there ever since?

A. No, sir.

Q. And what period of time were you not there?

A. From '41 to '45.

Q. And where were you in that period of time?

A. In the army.

Q. Except for that spell in the army have you been operating horses with a concession in the park?

A. Yes.

Q. What is your custom or what is your practice with walking or running horses when you have a party like that?

A. It is my practice never to run a horse with a party.

Q. Do you remember whether or not Ann asked you to run this horse? A. No, she never.

Q. Your testimony is she didn't?

A. She didn't, yes.

Mr. Blewett: I believe that is all.

Mr. Kouri: No questions.

The Court: That is all.

(Witness excused.) [333]

Mr. Blewett: Would you call Mr. Higgins please, Mr. John Higgins.

JOHN C. HIGGINS

having been duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Blewett): Would you kindly state your name? A. John C. Higgins.

Q. And what is your address, Mr. Higgins?

A. At the present time it is West Glacier.

Q. West Glacier, Montana? A. Yes.

Q. And what is your occupation?

A. Supervisory park ranger.

Q. And where do you live in the summer months?

A. At the present time I live at West Glacier year round.

Q. Year round? Do you spend any time at Many Glaciers? A. Not since 1956.

Q. Will you tell the Court and jury what your duties were on June 23rd of 1956?

A. I was the ranger in charge of the Many Glaciers area.

Q. The Many Glacier area? A. Yes, sir.

Q. Generally what did those duties consist of, if you can briefly tell? [334]

A. It would have been the management of the Many Glacier area, the protection of the people and protection of the Park.

Q. Well, did you cover the trails? A. Yes.

(Testimony of John C. Higgins.)

Q. And just acquaint yourself with operations in that general area?

A. It was responsibility for the entire operation.

Q. Now approximately how many times have you been over the Josephine Lake trail?

A. Oh, in excess of fifty times.

Q. And are you familiar with the trail?

A. Yes, sir.

Q. Are you familiar with each point of it from the time you leave the hitching post until you get to the Lake and back?

A. Yes, sir.

Q. Now, Mr. Higgins, are you familiar with the area in what we will call the immediately vicinity of the Many Glacier Hotel?

A. Yes, sir.

Q. And the hitching post that is used by the Wellmans in their horse operation?

A. Yes, sir.

Q. Are you familiar with a land mark, natural monument we will say, known as Mount Wilbur?

A. Yes, sir. [335]

Q. If you were to see a picture of that mountain could you with good degree of accuracy ascertain where on the Josephine Lake trail that picture was taken from?

A. If it showed additional land marks I could.

Q. If you saw a picture that showed land marks in that area you could?

A. I could give you the approximate location.

Q. At this time. Mr. Higgins, I would like to show you what has been introduced in this case as

(Testimony of John C. Higgins.)

the Plaintiff's Exhibit #10, and when it is flashed on the screen I would appreciate it if you would tell the Court and the jury what you think that picture is? Can you identify that picture, Mr. Higgins? A. Yes, sir.

Q. What is that picture?

A. Well, it is a picture of Mount Wilbur, and it is taken from very close to the service road, off the service road probably. It is from south of the Hotel. I can tie it down pretty close.

Q. Will you step up with a pencil and point out to the Court and the jury the land marks by which you can identify the picture, from your knowledge and background of that area?

A. This is my house right here (indicating). And this is a bay that is south of the hotel. Here is a point. That is the largest point that extends out into the bay. There is the summit of Mount Wilbur. The approximate line of sight is [336] running through there. That is the mouth of Swift Current Creek. This right here (indicating) from this house to this point, that gives you two real good land marks there.

Q. Where in reference to your house is the picture, where is your house?

A. The house is roughly right there in the center of the picture.

Q. And from your knowledge of the terrain there all through that area on the trail—let me ask you this. The picture had to be taken from this side (indicating)?

(Testimony of John C. Higgins.)

A. Yes, it is from the east side of Swift Current Lake.

(At this time Defendant's Exhibit #33, being a map was marked by the Clerk for identification.)

Q. Handing you what is now marked for identification as the Defendant's Exhibit #33, Mr. Higgins, would you be kind enough to tell the Court and jury what that is?

A. This is a sheet from our trail book. It shows the location of the trails in the Many Glaciers area. It is from the trail book in use in the Park.

Q. That is a sheet or map or drawing of not only the trails, but what else does it include?

A. It shows the entire Many Glacier developed area. That is the title of it.

Q. Does that show also the trail known as the Josephine Lake trail? [337]

A. It shows the position of it near the Many Glacier Hotel.

Mr. Blewett: We would like to introduce Defendant's Exhibit #33.

Mr. Kouri: Is it drawn to scale? If it is I don't think we will have any objections?

Q. Is it drawn to scale?

A. No, it is not drawn to scale. It is an accurate representation as sketched.

Mr. Kouri: We have no objection.

The Court: Defendant's Exhibit #33 is received without objection.

(Testimony of John C. Higgins.)

(Whereupon Defendant's Exhibit #33, being a map, was received into evidence.)

Q. (By Mr. Blewett): Will you, Mr. Higgins, now mark on Defendant's #33 approximately where you would locate the Doctor when the picture we just showed you was taken? You can assume for the purposes of this question and what you are about to do, that the Doctor testified that this was the last picture which he took on the return trip and that he took this while seated on a horse with a camera at eye level, while seated on a horse.

A. (Marks.)

Q. You might initial that, if you will, after you mark it. [338]

A. (Marks and initials.) I just marked it with an X and put my initials to the side of it.

Q. Mark there also where the Doctor was when he took the last picture, which has been identified as Exhibit #10?

Mr. Kouri: We object to that. That would call for a rank conclusion for this witness to testify where the Doctor was. Certainly the Court is not going to allow this witness to surmise where the Doctor was on June 23, 1956.

The Court: I am not sure the question shouldn't be limited where that particular picture was taken, rather than where the Doctor was when he took it.

Mr. Blewett: I thought that was my question. From his land marks and knowledge of the area he could tell where the picture was taken.

The Court: I think it should be limited.

(Testimony of John C. Higgins.)

Q. If I did not ask that, I meant to. Mr. Higgins, does this mark on the map indicate the approximate point from where that picture was taken you just saw?

A. Yes, sir, that was my interpretation of your question, where that picture was taken from.

Q. You did not understand me to say where the Doctor was? A. No.

Q. I did not mean to. If I did, I am sorry. Now directing your attention again, Mr. Higgins, to Defendant's Exhibit #33, [339] I will ask you if you can identify on there what is referred to as the trail which leads to the hitching post from the service road?

A. Yes. As I understand, you want the trail from the service road to the hitching post on this?

Q. As best you can?

A. I will just parallel it with this.

Q. Now directing your attention, Mr. Higgins, to Defendant's proposed Exhibit #34, I hand you Defendant's proposed Exhibit #34, and ask you if you will tell the Court and jury whether or not that is an accurate representation of the Many Glaciers area, including the terrain, on June 23, 1956?

A. Yes.

Mr. Blewett: I offer Defendant's proposed #34 in evidence.

Mr. Kouri: No objection.

The Court: Defendant's Exhibit #34 is received without objection.

(Testimony of John C. Higgins.)

(Whereupon Defendant's Exhibit #34, being a photograph, was received into evidence.)

Q. Now directing your attention to Defendant's Exhibit #33, would you mark on Defendant's Exhibit #34 the approximate point where the picture which you have just seen was taken? Do you want to do that in ink?

A. It would probably look better. [340]

Q. Mr. Higgins, from the point where you have marked the X until the point where that trail takes off, approximately how far is it from the X to the point where that trail takes off the service road?

A. It would be not in excess of twenty yards. It would be less than twenty. Twenty would be your outside measurement there.

Mr. Blewett: I believe that is all, Mr. Higgins.

Cross Examination

Q. (By Mr. Kouri): Of course, Mr. Higgins, on the map there and from your testimony, placing the various points there from the land marks, those are approximations aren't they, your best estimate?

A. Very close approximations.

Q. And that is as you told us, that map is not drawn to scale?

A. It is an accurate representation.

Q. Now you have been in the capacity of which you have described to us here in that park for how many years?

A. In my present capacity for five years.

Q. You are very familiar naturally, aren't you,

(Testimony of John C. Higgins.)

Mr. Higgins, with the area, especially during the summer months?

A. With the Many Glacier area, yes. [341]

Q. The season usually is from June through probably the middle of September, isn't it, when many of the tourists come?

A. Your heavy use season.

Q. How do you go about in your duties? Do you go by vehicle?

A. Vehicle, foot and horseback.

Q. I see. You have, of course, been up the trail which is involved here in this case, from the Hotel or hitching post going up to Lake Josephine?

A. Yes, sir.

Q. I presume you have ridden it many times up and back? A. Yes, sir.

Q. It is wide at first, is it not, say approaching from the hotel?

A. Approaching it from the hotel?

Q. Yes, sir?

A. Leaving the hitch wrack itself?

Q. From the hitch wrack, yes, sir?

A. That trail has a tread—the width of the trail there would be three feet from center line. It would be approximately a six foot tread on that.

Q. It is an old wagon trail, isn't it?

A. No, not the trail as it leaves the hitch wrack. That was your question, wasn't it, from the hitch wrack?

Q. One portion of it is part of an old wagon trail, isn't it? [342]

(Testimony of John C. Higgins.)

A. You are talking now about the service road and the portion of it which is the service road?

Q. You go from the hitching wrack to the service road and then you hit the trail, is that right, or am I in error?

A. Taking it in order, you go on the hitch wrack, then the trail, then service road and back on the trail. The service road comprises part of the trail.

Q. From the hitching wrack to Lake Josephine how many trails are there that you could go on? Are there more than one? A. Yes, sir.

Q. Is it possible to take one say going to the Lake and come back by another?

A. There are three main trails, two that are used by horses and one is a foot trail.

Q. Let's confine this to the ones used by horses. What are the names of those two trails that they use horses on?

A. The lower one which this service road comprises, goes to the foot of Josephine Lake and is called the Josephine Lake trail. The other one is the Piegion Pass trail. There is a cut down to the other trail to the foot of the lake.

Q. You have ridden up and down the Josephine Lake trail many times, haven't you?

A. Yes, sir.

Q. Usually in the month of June as you ride through it [343] there is quite a bit of foliage, trees along the trail is there not? I don't mean all the way?

(Testimony of John C. Higgins.)

A. Not too much yet in June. You are talking about the annual plants growing up green?

Q. I am talking about all the annual plants?

A. Your plants along the side of the trail haven't had much chance to grow.

Q. What about the trees?

A. Yes, you have the trees.

Q. And say riding back, I know you are oriented on it because you have been up there many years, walking or riding back on that trail on your right the foliage and trees would obstruct your view would it not?

A. At what point? It varies.

Q. I don't mean all the way, but at many places along the trail there is lots of trees as you so stated a moment ago, riding back toward the hotel?

A. Yes, it would obstruct a view sideways, off into the timber.

Q. Wouldn't you have more opportunity to have a better view on clearings to your left coming back to the hotel at various intervals? A. No, sir.

Q. Well, are there any clearings at all coming back say looking to your left, where you can view the Lake? [344]

A. Yes, where you can view Swift Current Lake?

Q. Yes, sir?

A. One partial clearing where you can see a portion of the lake.

Q. Mr. Higgins, would you mind stepping here in front of the jury. I know this map is not an

(Testimony of John C. Higgins.)

enlargement. Now on this map here which you can tell is drawn to scale, in this area here (indicating) point out to the jury the location of the hotel, where it is?

A. The hotel is a little black line right along there.

Q. Now if you will just point out where Josephine Lake is to the jury?

A. This is Lake Josephine here (indicating).

Q. And how far would you say it is from Lake Josephine to the Hotel approximately?

A. From where the trail hits the foot of Lake Josephine to the Hotel?

Q. Yes, sir?

A. Approximately a mile and one-tenth.

Mr. Kouri: That is all, Mr. Higgins. Thank you.

Mr. Blewett: That is all.

(Witness excused.) [345]

Mr. Blewett: We will rest.

Mr. Kouri: Your Honor, the plaintiff closes.

The Court: Well, I think we had probably better just excuse the jury subject to call. Court will be in recess for at least fifteen minutes, and the jury will keep in mind the admonition I have heretofore given, you are still not to converse among yourselves or with anyone else regarding this case, or form or express an opinion until it is finally submitted to you. Court is now in recess subject to call (10:10 A.M.)

(Whereupon, pursuant to recess, court was resumed at which time plaintiff, defendant, all counsel, and all members of the jury were present.)

The Court: Each side will be given one hour for argument. Plaintiff's opening argument.

(At this time Mr. Kouri presented argument to the jury on behalf of the plaintiff.)

The Court: Defendant's argument.

(At this time Mr. Blewett presented rebuttal argument to the jury on behalf of the defendant.)

The Court: Plaintiff's closing argument.

(At this time Mr. Bretz presented rebuttal argument to the jury on behalf of the plaintiff.)

The Court: There are just one or two matters I think it might be well to take up with counsel in the absence [346] of the jury, one or two rulings, so I will first excuse the jury. (jury admonished) We will resume at 1:45. The jury is excused until 1:45. I will ask counsel to remain for just a moment.

(At this time the jury left the court room.)

The Court: I have heretofore advised counsel informally, but it should be a matter of record, that the motion to amend the complaint is denied.

Mr. Kouri: Which we except to, your Honor.

The Court: Now the clerk calls my attention to the fact that exhibits 20 and 32 were not received in evidence. That would be the mortality table, and exhibit 32 was the Great Falls Clinic report. I had overlooked the fact myself.

Mr. Blewett: I have no objections to the mortality table, your Honor. The record may show that the record may be corrected to show that both exhibits are admitted in evidence.

Mr. Kouri: We have no objections.

The Court: The record then is corrected to show Exhibits 20 and 32 are received without objection. That is all I had.

(Whereupon Exhibits #20 and #22, being a mortality table and a report from the Great Falls, Clinic, were received into evidence.)

The Court: Court will now be in recess until 1:45. (12:05 P.M.) [347]

(Whereupon at 1:45 P.M., pursuant to recess, court was resumed, at which time plaintiff, defendant, all counsel and all members of the jury were present.)

Instructions To Jury

The Court: Ladies and Gentlemen of the Jury: Now that you have heard the evidence and the argument of counsel, it becomes my duty to instruct you as to the law governing the case. It is your duty as jurors to follow the law as stated in the instructions of the court, and to apply the law so given to the facts as you find them from the evidence before you. You should not single out one instruction alone as stating the law, but must consider the instructions as a whole. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your duty to base a verdict upon any other view of the law than that

given in the instructions of the court. On the other hand, you are the sole judges of the facts, and you must determine the facts for yourselves solely upon the evidence presented at this trial.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the complaint of the plaintiff, Dr. Robert L. Hargrave, and the answer thereto of the defendant, E. G. Wellman. You are to perform this duty without bias or prejudice as to either [348] party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The parties and the public expect that you will carefully and impartially consider all the evidence, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. The law is no respecter of persons; all persons stand equal before the law, and are to be dealt with as equals in a court of justice.

In these instructions I will first state some general rules or principles of law which are applicable to all civil cases, and then I will instruct you more specifically on the law applicable to this particular case.

Whenever in these instructions I state that the burden, or the burden of proof, rests upon a party to prove a certain allegation made by that party, I mean that unless the truth of that allegation is

proved by a preponderance of the evidence, you shall find that allegation to be not true.

The term "preponderance of the evidence" means the greater weight of the evidence. In other words, such evidence as, when weighed with that opposed to it, has more convincing force and produces in your mind conviction of the greater probability of truth, after you have considered all of the evidence in the case. [349]

Evidence may be either direct or indirect. Direct evidence is that which in itself, if true, conclusively establishes a fact. Indirect evidence is that which tends to establish a fact in dispute by proving another fact. Indirect evidence is of two kinds, namely, presumptions and inferences.

An inference is a deduction or conclusion which reason and common sense lead the jury to draw from facts which have been proved.

A presumption is an inference which the law requires the jury to make from particular facts. Unless declared by law to be conclusive, a presumption may be overcome or outweighed by direct or indirect evidence to the contrary of the fact presumed; but unless so outweighed, the jury are bound to find in accordance with the presumption.

Statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

The evidence in the case consists of the sworn

testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been admitted or stipulated, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was [350] sustained by the court, and any evidence ordered stricken by the court, must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your experience.

During the trial of this case certain testimony has been read to you by way of deposition. The testimony of a witness who for some reason cannot be present to testify from the witness stand is usually presented in the form of a deposition. Such deposition is entitled to the same consideration and, in so far as possible, is to be judged as to credibility and weighed by the jury in the same way as if the witness had been present.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce, and of the other to contradict; and therefore, if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. [351]

You, as jurors, are the sole judges of the credi-

bility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness's intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood. If you find the presumption of [352] truthfulness to be outweighed as to any witness, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness's present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce conviction in your minds, as against the testimony of a lesser number of witnesses or other evidence which does produce conviction in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witness and which evidence appeals to your minds as being most accurate and otherwise trustworthy. [353]

The testimony of a single witness, which produces conviction in your minds, is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony even though a number of witnesses may have testified to the contrary if, after weighing all the evidence in the case, you believe

that the balance of probability points to the accuracy and honesty of the one witness.

It is the duty of attorneys on each side of a case to object when the other side offers testimony or other evidence which counsel believes is not properly admissible. It is the duty of the court to decide whether, under the rules of evidence, such testimony or other evidence may be received.

Whenever the court has sustained an objection to an offer of evidence, the jury are not to consider in their deliberations the offer or the objection, or the ruling of the court in rejecting the offered evidence.

Thus when the court has sustained an objection to a question, the jury are to disregard the question, and may draw no inference from the wording of it or speculate as to what the witness would have said if permitted to answer. Nor may the jury assume an attorney has objected to a question because he expected the answer, if given, would be unfavorable to his side of the case. [354]

In allowing evidence to be introduced over the objection of counsel, the court does not, unless expressly stated, indicate any opinion as to the weight or effect of such evidence. As stated before, the jurors are the sole judges of the credibility of all witnesses and the weight and effect of all evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called expert witness is an exception to this rule. A witness who by education and experience has become expert in any art, science, profession or call-

ing may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves; and you may reject it entirely if you conclude the reasons given in support of the opinion are unsound.

The nature and extent of the injuries, if any, which proximately resulted from an accident may not be proved by evidence of statements as to aches, pains or injuries made to a doctor in connection with the doctor's observation, examination or treatment. Such statements are received in evidence for the purpose of enabling the doctor to tell you everything [355] upon which he may have based any opinion expressed as to a person's physical or mental condition.

The opinion of a doctor as to the condition of a patient may be based entirely upon objective symptoms revealed through observation, examination, tests or treatment; or the opinion may be based entirely upon subjective symptoms revealed only through statements made by the patient; or the opinion may be based in part upon objective symptoms and in part upon subjective symptoms.

To the extent that any opinion testified to by a doctor is based upon subjective symptoms stated to him by a plaintiff, the jury are entitled to consider the trustworthiness of such statements in determining the weight to be given the opinion.

We come now to a consideration of the principles

of law which relate more specifically to this particular case. The plaintiff, Dr. Hargrave, brought this action against the defendant, Mr. Wellman, for injuries alleged to have been sustained on June 23, 1956 while the plaintiff was riding a horse rented from the stables owned and operated by the defendant near Many Glacier Hotel at Glacier National Park. In my interrogation of the jurors on voir dire examination, I told you that the plaintiff alleged that the defendant was negligent in providing the plaintiff with a horse that was [356] unsuitable for the purpose and also in that Virgil Dillon, an employee of the defendant, without any warning, broke out in full speed with his mount, which caused the plaintiff's horse to suddenly bolt. I told you further that the defendant denied any negligence and also had pleaded contributory negligence of the plaintiff, and also that plaintiff voluntarily assumed any risks of injury which might result in connection with the ordinary risks incident to horseback riding. As counsel have told you in their arguments, the alleged negligence of the defendant in furnishing an unsuitable horse, and likewise the alleged contributory negligence of the plaintiff, are withdrawn from your consideration. Accordingly, as the case now stands, it is the contention of the plaintiff that the defendant Wellman, through his employee Dillon, was negligent in that on the return trip from Josephine Lake, Dillon suddenly and without warning to plaintiff, started his horse ahead at a full gallop, thereby causing plaintiff's horse to suddenly bolt and run; that plaintiff was unable to

stop his horse and that as a result of such negligence plaintiff suffered an injury to his back. Defendant denies that Dillon was negligent in any way, and contends that Dillon did not make his horse run. Defendant contends further that the plaintiff assumed the risks of an ordinary horseback ride, and that if plaintiff's horse did run, it did nothing more than any other suitable saddle horse would have done under the same or similar circumstances. Defendant also denies the injuries to plaintiff's back. [357]

The mere fact that an accident happened, considered alone, does not support an inference that either party to this action was negligent.

In order to establish the essential elements of plaintiff's case, the burden is upon the plaintiff to prove, by a preponderance of the evidence, the following facts: First, that the defendant was negligent as alleged; and second, that the defendant's negligence was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

During these instructions, I will refer from time to time to the term "negligence," "ordinary care," and "proximate cause." What do we mean by these terms?

Negligence is the doing of an act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, under the circumstances presented by the evidence. It is the failure to use ordinary care under the circumstances in the management of one's property or person.

Ordinary care is that care which persons of ordinary prudence exercise in the management of their own affairs in order to avoid injury to themselves or others. Ordinary care is not an absolute term, but a relative one. By this we mean [358] that in deciding whether ordinary care was exercised in a given case, the conduct in question must be considered in the light of all the surrounding circumstances, as shown by the evidence.

The proximate cause of an injury is a cause which, alone or in conjunction with other causes, produced the injury, and without which it would not have occurred. Thus an act or omission of a person which sets in operation some thing that brings about an injury is held to be the proximate cause of the injury, unless the causal force of the act or omission has been broken by some new or intervening cause prior to the injury.

This does not mean that the law recognizes only one proximate cause of an injury, consisting of only one factor or thing, the conduct of only one person. To the contrary, many factors or things, the conduct of two or more persons, may operate concurrently, either independently or together, to cause an injury; and in such a case, each is regarded in law as a proximate cause.

The operator of a riding stable used by the public generally has a duty to exercise ordinary care. The standard of care required in a case of this nature is what a reasonably prudent and careful person, under the same or similar circumstances, would have exercised. [359]

If you find from a preponderance of the evidence that on the return trip from Lake Josephine, Virgil Dillon, without warning to plaintiff, caused his horse to break into full speed as alleged, which in turn caused plaintiff's horse to bolt and run, and that a reasonably prudent and careful person under the same circumstances would not have done so, and that this act of Dillon was a proximate cause of the accident and the resulting injuries to plaintiff, then your verdict must be for the plaintiff.

Unless, however, you find from a preponderance of the evidence (1) that Dillon caused his horse to break out in full speed; and (2) that the running of Dillon's horse also caused plaintiff's horse to run, and (3) that under the circumstances Dillon should have warned plaintiff that his horse was going to run, then you must return your verdict for the defendant.

As I have heretofore stated, in order to return a verdict for the plaintiff, you must find that the negligence, if any, on the part of Dillon was the proximate cause of the injury or condition complained of by plaintiff. The negligence of a person cannot be the proximate cause of injury to another unless under all of the attending circumstances, ordinary prudence would have admonished the person sought to be charged with negligence that his act or omission would probably result [360] in injury to someone. The general test as to whether negligence is the proximate cause of an accident is therefore said to be whether it is such that a person of ordi-

nary intelligence should have foreseen that an accident was liable to be produced thereby.

The defendant was not an insurer of the safety of the plaintiff. A person who rides a horse hired for that purpose assumes or takes upon himself the ordinary risks incident to such riding. The plaintiff assumed all risks which he knew or, in the exercise of ordinary care, should have known, were inherent in the trip. But the plaintiff did not assume any additional risks which were proximately caused by the failure of the defendant, if any, either before or at the time of the accident, to exercise ordinary care under the circumstances.

In other words, if the plaintiff's horse suddenly started running, as alleged, it is then a question of whether that running was one of the ordinary risks incident to horseback riding under the circumstances of this case. If you find from the evidence that the running of plaintiff's horse was caused by negligence of Virgil Dillon, as defined elsewhere in these instructions, then that was not a risk assumed by the plaintiff. If you find from the evidence that plaintiff knew or, in the exercise of ordinary care should have known that a suitable saddle horse might start running in that manner, then that was a risk which was assumed by the plaintiff. [361]

If, adhering to the court's instructions, you find that plaintiff is entitled to a verdict against the defendant, it then will be your duty to award the plaintiff such amount of damages as will compensate him reasonably for all detriment suffered by

him and of which defendant's negligence, as found by you, was a proximate cause. Instructions as to damages are given to be applied only in case you find the plaintiff is entitled to a verdict on the evidence. They have no application where, upon consideration of the whole case, the liability of the defendant has not been established, nor should they be understood by the jury as conveying any intimation that in the opinion of the court the plaintiff is or is not entitled to damages. That is the sole province of the jury. Instructions as to the measure of damages are intended for your guidance, in the event you find from the evidence in favor of the plaintiff.

The burden rests upon the plaintiff to prove by a preponderance of the evidence the elements of his damage. You are not permitted to award the plaintiff speculative damages, by which is meant compensation for future detriment which, although possible, is remote, conjectural, or speculative. However, should you determine that the plaintiff is entitled to recover, you should compensate him for future detriment, if a preponderance of the evidence shows such a degree of probability of that detriment occurring as amounts to a [362] reasonable certainty that it will result from the injuries in question.

The amounts of damages alleged in the complaint which have been suffered by the plaintiff are merely claims and not evidence, and must not be considered by you as evidence or accepted by you as any criterion as to the damages sustained by the plaintiff

in the event you find for the plaintiff; except that the amount of damages alleged in the complaint does fix a maximum limit, and you are not permitted to award the plaintiff more than the amount demanded in the complaint.

If you find from the evidence and under these instructions that plaintiff is entitled to a verdict, in computing the amount of damages you will take into consideration the nature and extent of the injuries sustained by plaintiff and will consider the following elements of damage:

1. The reasonable value of the time lost by plaintiff since his injury during which he was unable to pursue his profession. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find that he was reasonably certain to have earned during the time lost had he not been disabled;

2. Such sum as will reasonably compensate plaintiff for any loss of earning power which he is reasonably certain to suffer in the future. The measure of damages for impairment [363] of earning capacity is the difference between the amount which the plaintiff was capable of earning before his injury and that which he was capable of earning thereafter. In fixing this amount, you may consider what plaintiff's health, physical ability and earning power were before the accident and what they are now, the nature and extent of his injuries, whether or not they are reasonably certain to be permanent,

all to the end of determining the effect of his injuries upon his future earning capacity and the present value of the loss so suffered. Before damages can be awarded for loss of earning capacity it, of course, must first be found that the plaintiff's earning capacity has been impaired by the injuries received through the defendant's acts or omissions.

3. Such sum as will compensate plaintiff reasonably for physical and mental strain and suffering, if any, endured by him and proximately resulting from the injuries in question and for such like detriment, if any, as he is reasonably certain to suffer in the future from the same cause. The law does not prescribe any definite standard by which to compensate an injured person for pain and suffering, nor does it require that any witness should have expressed an opinion as to the amount of damages that would compensate for such injuries. The law does require, however, that when making an award for pain and suffering, the jury shall exercise its authority with sound discretion, and that the damages shall be just and reasonable in the light of the evidence. [364]

According to the American Experience Table of Mortality, the expectancy of life of one aged 54 years is 18.09 years. This fact is in evidence and may be considered by you in arriving at the amount of damages, if any, sustained by the plaintiff for loss of future earnings and future pain and suffering, in the event you find that plaintiff is entitled to recover for these items of damage. Standard mortality tables showing the expectancy of life

at a given age are competent evidence, but are not conclusive or controlling, and are merely matters of evidence which you may take into consideration with other evidence bearing on the same issue, such as occupation, health, habits, and activities of the person involved and the infirmities of advancing age. You are not entitled to compute a figure for pain and suffering and multiply it by the number of years which the plaintiff may live and thus reduce that amount to a sum certain for the present.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only [365] after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Upon retiring to the jury room, you will select one of your number to act as foreman. The fore-

man will preside over your deliberations and will be your spokesman in court.

Forms of verdict have been prepared for your convenience. (Forms of verdict were read by the court at this time.)

You will take these forms to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreman fill in, date and sign the form which sets forth the verdict upon which you agree; and then you will return with your verdict to the court room.

If it becomes necessary during your deliberations to communicate with the court, you may send a note by the bailiff. But bear in mind you are not to reveal to the court [366] or to any person how the jury stands, numerically or otherwise, until you reach a unanimous verdict.

It is proper to add this caution: Nothing that I have said during the course of this trial, no ruling I have made, and nothing contained in these instructions should suggest or convey in any way or manner any intimation as to what verdict I think you should find. If, during the trial, I have said or done anything which has suggested to you that I am inclined to favor the position of either party, you should not be influenced by such suggestion. What your verdict shall be is the sole and exclusive duty and responsibility of the jury.

The Court: Counsel now will be given an opportunity to take exception to the Court's charge.

Mr. Blewett: Your Honor, I may be wrong on this, but do the rules provide it has to be done in the presence of the jury?

The Court: I don't think so.

Mr. Blewett: I would like to have it stipulated.

Mr. Kouri: It is stipulated.

The Court: No, there was some question about it. I think it reads it must be done outside the hearing of the jury. [367] In some districts it is and some it isn't. But anyway, let the record show it is stipulated that the exceptions may be taken outside of the presence of the jury.

(At this time Court and counsel retired to chambers to take the exceptions to the Court's instructions to the jury.)

Exceptions to Instructions

Mr. Kouri: Now comes the plaintiff and objects and excepts to the Court's charge, more particularly to the Court failing to charge the jury upon the law of bailment, which charge was tendered to the Court in writing timely, prior to the preparation of the charge of the Court as a whole. The plaintiff further objects to the charge for the reason that it fails to charge on the question of the defendant being a common carrier, which instruction was timely prepared and presented by the plaintiff. The plaintiff further objects and excepts to the instruction of assumed risk given by the Court,

for the reason that said instruction does not correctly state the law in that it fails to reveal that the law of assumed risk cannot be applicable if the plaintiff was not in any way at fault. The plaintiff further objects to the failure of the Court in his main charge to give the definition of or what an invitee is, which term and instruction was properly prepared and presented to the Court prior to the preparation of the main charge. [368]

Mr. Blewett: I have none.

(At this time Court and counsel returned to open court.)

The Court: Well, at this time Mr. Baumgartner the alternate juror will be excused. (Alternate juror excused.) Then I will ask the clerk to swear the bailiffs.

(The bailiffs were sworn at this time to take charge of the jury.)

The Court: Now, ladies and gentlemen of the jury, you will be in custody of the bailiffs who have just been sworn, and all of the exhibits which have been received in evidence will be available for you in the jury room. You will now retire to the jury room for your deliberation. The court will be in recess subject to call to take your verdict. [369]

* * * * *

[Endorsed]: Filed May 18, 1959.

[Endorsed]: No. 16483. United States Court of Appeals for the Ninth Circuit. Robert L. Hargrave, Appellant, vs. E. G. Wellman, doing business as Wellman Enterprises, Appellee. Transcript of the Record. Appeal from the United States District Court for the District of Montana.

Filed: May 21, 1959.

Docketed: May 29, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16483 Civil

ROBERT L. HARGRAVE, Appellant,

vs.

E. G. WELLMAN, D/B/A WELLMAN ENTER-
PRISES, Appellee.

STATEMENT OF POINTS AND DESIGN-
NATION OF RECORD

Comes now the Appellant, Dr. Robert L. Hargrave, and pursuant to Rule 17, Subsection 6, would file this his designation of points relied upon for appeal and designation of the record to be printed and distributed by the Honorable United States Court of Appeals for the Ninth Circuit.

Points Relied Upon for Appeal

I.

The Honorable District Court erred in submitting to the jury the doctrine of assumption of risk, in that the doctrine would not apply unless the particular condition of peril had continued long enough so that the person alleged to have assumed the risk could have known or would have been charged with knowledge of the danger.

II.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law of bailment, in that the undisputed evidence raised such instruction and issue.

III.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to common carriers, in that the undisputed evidence raised such instructions and issues.

IV.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to invitees, in that the undisputed evidence raised such instructions and issues.

V.

The Honorable District Court erred in failing to submit the written instructions, which were timely submitted, relative to the law pertaining to implied warranties, in that the undisputed evidence raised such instructions and issues.

VI.

The Honorable District Court erred in failing to submit written instructions and issues, which were timely submitted, relative to the application of the law of contributory negligence, as defined and tendered by the Plaintiff.

VII.

The Honorable District Court erred in failing to allow Plaintiff to amend his complaint, under and by virtue of Rule 15(b), which would not have worked a surprise upon the Defendant, nor would it have operated as a hardship to the Defendant.

Designation of the Record for Printing

(1) Plaintiff's Original and Amended Complaint filed herein.

(2) Defendant's Answer.

(3) All of Plaintiff's exhibits.

(4) All of Plaintiff's written tendered instructions and issues upon the law of bailment, the law pertaining to common carriers, the law pertaining to invitees, the law pertaining to implied warran-

ties, and the law of contributory negligence as defined by the Plaintiff.

(5) The Court's Charge and instructions to the jury.

(6) Verdict of the jury.

(7) Judgment of the Court.

(8) Notice of Appeal.

(9) Points Relied upon for Appeal herein.

(10) Praecipe and Designation of the Record and service thereon.

(11) Certificate of the Clerk.

(12) Cost Bond.

(13) Transcript of the Testimony.

(14) Objections of the Plaintiff to charge of the Court.

(15) Those portions of the Statement of Facts as typed by the official Court Reporter, Don W. Larsen, and contained in the typewritten statement of facts from Page 8, Line 13 and continuing unto Page 283, Line 6; beginning at Page 294, Line 9 and continuing onto Page 369, Line 15.

That such transcript of the record is to be printed in conformity with the Rules of Civil Procedure and filed of record with the Clerk of the United

States Court of Appeals for the Ninth Circuit, San Francisco, California.

Respectfully submitted,

L. R. BRETZ,
KOURI AND BANNER,
/s/ By PHILIP S. KOURI,
Attorneys for Appellant
Robert L. Hargrave.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 10, 1959. Paul P. O'Brien, Clerk.